

Missouri. Supreme court

REPORTS



OF

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

2055 F

OF

THE STATE OF MISSOURI.

BY WM. A. ROBARDS,

ATTORNEY GENERAL AND EX-OFFICIO REPORTER.

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JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. WILLIAM B. NAPTON,
HON. JOHN F. RYLAND,
HON. JAMES H. BIRCH.

ATTORNEY GENERAL:
WILLIAM A. ROBARDS.

NOTE.—When I came into office, I found the notes to the Decisions in this Volume prepared, and the Terms at which they were made, designated, by my lamented predecessor. They bore all the evidences of completion, and I had them published, as his, without alteration. The Table of Cases Reported, and the Index, alone, are mine. I have thought this statement due alike to the memory of my predecessor and to myself. I never knew him, but all who did, alike bear testimony to his virtues, and ardent devotion to his profession, and the duties of his office.

JAS. B. GARDENHIRE.

SUPREME COURT.

JANUARY TERM, 1850.

THE STATE *vs.* HEREFORD.

An indictment for a violation of the 8th section of the act of this State entitled an "act to sustain the credit of the State," approved February 16, 1847, which follows the words of the act, is good.

ROBARDS, Attorney General, for the State.

The indictment is in the very words of the statute, and is indeed more specific in its allegations than was necessary. It was sufficient to allege that the defendant followed the practice of medicine as a business, without alleging that he also followed it for a livelihood. The objection that it is alleged that he had no physician's license is of no weight. It was proven and was more specific than was necessary, for it would have been sufficient to say that he had no license.

HEREFORD for the defendant.

1. The indictment, after averring the time and place when and at which the defendant followed the practice of medicine, should have followed that averment with the allegation, that the defendant, at that time and place, practised medicine without a license, with the usual designation "then and there," or words to the same effect. Chitty's Crim. Law, vol. 1, page 198.

2. It is laid in the indictment, that the said G. W. Hereford did not have a physician's license. In some states, a physician's license is a diploma; in others a certificate of qualification from a board of physicians appointed by the Legislature, neither of which is requisite under the statute of this State. The indictment requires that which the statute does not.

Judge BIRCH delivered the opinion of the court.

The defendant was indicted for a violation of the 8th section of the

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"act to sustain the credit of the State." The indictment contains two counts, both conforming to the words of the statute, except (as is alleged) that they erroneously or insufficiently charge it as an offence under that statute, that the defendant followed the business "without having a physician's license continuing in force," &c., instead of "a license to follow such profession," &c.

It is deemed unnecessary to enquire into the sufficiency of such an indictment upon general principles, as it will be perceived, by reference to the 10th section of the act upon which it is founded, that the Legislature itself designated and described the license which the previous sections required, should be obtained from the collector, in order legally "to follow such profession" as a physician's license, from which it is apparent that so far from the offence having been ambiguously or insufficiently alleged, it was charged in exact conformity with the legislative letter and meaning of the act.

In quashing the indictment, therefore, the circuit court committed error, for which its judgment must be reversed and the cause remanded.

Concurred in.

W. B. NAPTON.

LONG vs. STORY ADM'X. OF STORY, DEC'D.

1. A and B were formerly partners in the mercantile business: After the dissolution of the partnership, A executed a note to C in the name of the firm. Upon the trial of a suit upon the note against B, the latter released A (who was not a party) from all claim on account of the note, and offered him as a witness to prove that the note was executed for his individual debt. Held that A was a competent witness for B.
2. No ground of error will be considered in the supreme court which has not been assigned and relied upon in the court below.

APPEAL FROM CLAY CIRCUIT COURT.

ABELL & STRINGFELLOW for appellant.

The witness, J. H. Long, was competent; the suit having been dismissed as to him, he was no longer a party to the suit. He could not be affected by the judgment further than, if it

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should be against the defendant, to be liable to the defendant for contribution. The release of defendant discharged him from this liability. A judgment in favor of defendant would not release him; the defence as to which he was called being alone applicable to the defendant, and in no wise affecting the rights or liabilities of the witness. One not a party to the suit, but liable to contribution, is a competent witness for defendant if released from all liability. 2 Wen. 527; 3 Wen. 240; 21 Wen. 136; 1 Hill 356; 3 Wen. 380; 1 Greenleaf, § 355, 356. In 3 Wen. 380, a co-obligor held to be competent as a witness in a suit against the others, is competent to establish a defence alone affecting the others, even *without a release*.

HAYDEN for appellee.

1. The court ^{did} not err in sustaining the objection to the competency of the witness, James H. Long, offered ^{by} the defendant to testify to the facts which defendant proposed to prove by him. He was a party to the note sued on, and equally bound for its contents with the defendant to the plaintiff, and the release executed by the defendant to him, did not effect or change the nature of his liability to the plaintiff for the debt sued for. And I hold it not to be competent for a joint co-promisor or co-obligor to make a release to his fellow of his responsibility upon their note, so as to qualify him to testify in his favor when sued for the joint debt. If such thing can be done, a creditor having a claim against more than one person as makers of a note or bond, would be liable in case he shall bring separate actions against them to be defeated in every case by their giving their respective releases to each other from all responsibility, in regard to the respective recoveries sought for against them in the several actions. For instance, A and B make their joint note to C for a debt. As joint promisors they *elect* to locate themselves in sister states where they cannot be joined in the same action as defendants; but they are sued within the respective jurisdiction to which they belong. B is introduced as a witness to prove that A, at the time the bond was made, was an infant, and therefore not bound, or he proves some other fact which in law is a bar to the payee's right of recovery; and judgment of consequence is rendered in favor of A, who by releasing B has destroyed the plaintiff's right against him upon the bond. Then B is sued, and A is introduced in his favor, and being *now neither* liable to the plaintiff or the defendant in *this* action, he is *surely* competent to prove that the defendant has *long since* paid the debt to the plaintiff, and this would be nothing but liberality on the part of this witness, who had been by his co-obligor's testimony discharged from the debt. By this rule of law it would be practicable and convenient for joint debtors to discharge themselves from their liabilities, and the rights of obligors would depend upon the integrity and veracity of *men bribed by the full amount of their obligations to swear to falsehoods*. This would be a monstrous rule to be recognised as correct in any code of laws.

2. The defendant, in his motion for a new trial, did not complain of the alleged error of the circuit court in rejecting the testimony of J. H. Long as a witness, nor ask the court to set aside the verdict of the jury, for that reason, and therefore he has no right *now here* to ask this court to set aside the verdict for that cause. See the following cases decided by this court and the cases therein referred to: 10 Mo. R. 515, 516, 9 Mo. R. 501, 502, 227; 7 Mo. R. 226; 11 Mo. R. 623; 2 Mo. R. 189.

Judge BIRCH delivered the opinion of the court.

John Long and James H. Long were formerly merchants and partners, under the name and style of J. & J. Long. Sometime after the dissolution of the partnership, the note in suit was executed by J. H.

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Long, who signed the former partnership name. The cause having been discontinued as to J. H. Long, John Long filed, amongst others, a special plea, under oath, denying the execution of the note. On the trial, evidence was given to the effect that the note sued on was given in renewal of former partnership notes for money loaned, and that it was signed with the authority and consent of John Long.

The defendant having executed to J. H. Long a release from all claims on account of the note or the suit, offered him as a witness to prove that the note was executed for the individual debt of the latter, and that the partnership name was signed to it through mistake, and without authority from the defendant. The court rejected James H. Long as incompetent, and the defendant excepted. Other evidence was then given tending to show some of the same facts, but neither the evidence nor the instructions need be further considered in the view which is otherwise suggested and enforced by the record.

We have no doubt but that James H. Long was a competent witness under the circumstances, and for the purpose for which he was called. We have been recurring, however, to several previous decisions of this court, upon the reasoning of which, reliance has been placed to establish the practice that no ground of error shall be considered here which has not been assigned and relied upon in the motion for a new trial below; and in addition to the cases thus cited, we have ourselves found a still earlier and more apposite one, (1 Mo. 718) which may be regarded as having fixed and established the practice in all cases where it is insisted upon, as in the one under consideration.

For the reason then that the error assigned and relied upon in this case was not brought to the notice and consideration of the judge below, as a reason why he should grant a new trial, it cannot be considered here, and the judgment of the circuit court must consequently stand affirmed.

MARNEY et al. vs. STATE, use of VANCE.

MARNEY ET AL. vs. STATE, USE OF VANCE.

1. A sheriff during his first term, made a sale of real estate, on credit, under the statute concerning partition. He was elected for a second term and gave a new bond; during the second term he collected the money and failed to pay it over. Held, that the failure to account for the money was a breach of his first bond, and his securities in that bond are liable for the breach; that all the acts done by the sheriff in the matter during the second term, were only in completion of the duties incurred under the first bond.
2. The legislature may *enlarge the duties* of sheriffs during the term for which they are elected, and their securities are liable for the faithful performance of them.

ERROR TO BOONE CIRCUIT COURT.

HAYDEN for plaintiffs in error, insist:

1. That by the terms of the bond sued on, the defendants only bound themselves for the faithful performance of certain duties, specified to be performed by the said sheriff, Hamilton, in the condition of their said bond, for the *term of two years*, and until his successor in office should be elected and qualified; and that as *such securities* they have a right to stand upon the *very terms* of their contract. Miller vs. Stuart, 9th Wheaton, 680; same cases, 5th Cond. Rep. U. S. 727; same principles, same book, page 720; U. S. vs. Kirkpatrick et al. (5th Cond. Rep. 733); 2 Pick. Rep. 234-5, Boston Manufacturing Hat Company vs. Messenger et al.; 7 Cowen, 746, Gorham vs. Gale; 2 Saunders, 410, 411, 415, and the notes therein, Lord Arlington vs. Merrick; 3 Wilson, 530, Wright vs. Russell, 2nd. Wm. Blackson, 934; 1 Strange, 227, African Co. vs. Mason; 1 Tenn. Rep. 287, Barker vs. Barker; 15 Wend. 623, the people vs. Ring; 11 Mo. Rep. 585, Warner & Cornwall vs. State, use of Wilkins; 4 Hen. & Munford, 208, Fairfax vs. Commonwealth, 6 Munford Rep. 81, 82, Munford vs. Rice & others.

2. That by the terms of the bond sued on, the defendants, *as securities* of Hamilton, became bound for the faithful performance of the duties of sheriff of Boone county, as specified in the condition of the bond, for the term of two years, and until his successor should be elected and qualified; and that as Hamilton was duly elected and qualified as *his own successor in the office*, in the year 1842, he thereby ceased to be sheriff under and by virtue of his *first election* and first term. That the very fact of his *re-election* and *qualification as sheriff* for the second term, revokes and puts an end to *all* his official powers under his first appointment, and is evidence of his *abandonment* of every claim of power and authority to act as sheriff under his first commission, and *conclusively negatives* the idea or presumption that he either intended to perform, or that he *did perform in fact any act as sheriff*, within the latter term, under the *lifeless* powers of the first. But on the contrary, his report of his acts shows that they were performed by him as *then sheriff* of the county, and *as such treated and confirmed by the court and parties*.

3. That the bond sued on shows that the defendants became bound, only for the payment of such money as the sheriff should collect and not pay over, *as sheriff during the two years* and until his successor in office was qualified; and they insist, *as such securities*, that they have a right to stand upon the very terms of their contract, and therefore are not bound to pay the plaintiff the whole or any part of the money sued for in this action, because the evidence, as preserved in the bill of exceptions shows first, that no part of the money demanded became

due until after the expiration of the first term; and therefore he, Hamilton, had no official power to collect it during the first term; and second, if he had had the official power to collect it under his *first commission*, he did not collect the same, or any part thereof, until the years 1843 and 1844, which was during the second term, and collected by him as their sheriff of Boone county, and that therefore the default or breach by *the sheriff* was of the condition of the *second bond*, and after the discharge, by lapse of time, of the defendants from their liability under the *first bond*. That the second set of securities are therefore bound, if any securities be bound, by *their bond*, which would not be the case if the defendants were bound in law therefor, under *their bond*. See 15 Wend. 623, the people vs. Ring; 11 Mo. Rep. 585, Warner & Cornwall, vs. the State, to the use of Wilkins. The last set of securities are by the terms of their bond, bound for a faithful performance of all the *official acts* of their principal; and as all the acts of Hamilton, done in the premises, are shown by *the record, and by his own written reports and certificates*, to be done by him in the name of his office, and so recognised by the parties interested, they must be considered as done under the bond in force, when so done.

4. There is no evidence in the record, conducing to show that Hamilton, *at any time*, converted the money that was paid him for the lots in the years 1843 & 1844, to his own use, or that the same was demanded of him in his life time, or of his administrator since his death, if he had any, nor is there any evidence that he failed or neglected to make a good, legal return or report of his doings in the premises, as sheriff, during his continuance in office. That therefore it was the duty of the plaintiff, by proof to show that Hamilton did violate the condition of his bond, by refusing to pay the money (being a trustee) upon his being demanded so to do by the plaintiff, Vance, or to prove that he, Hamilton had converted the money to his *own use or otherwise*; and in this case, no such evidence was either offered or given on the part of the plaintiff. That a demand of the money of Captain Kirtley, one of his securities, *now sued*, was not sufficient, (if the *absurdity* can be indulged that he and his securities are liable in any event.) There was and could be no presumption in law arising out of the relation existing between Hamilton, *as sheriff* and Kirtley *as his security*, that Kirtley was the *deputy* or the holder of the moneys, collected by the sheriff, and a demand of Kirtley and his non-compliance therewith, furnishes *no presumption* of any default by the sheriff, or other breach of the condition of his bond, respecting the money demanded in this suit, and therefore for aught appearing to the contrary, the sheriff died possessed of the money, and was only prevented from paying it, by the act of God, which would and did excuse the sheriff and also his securities upon a charge, as this suit is of a violation of the *condition* of the bond, which condition only requires in its terms a *faithful performance* thereof by the sheriff, which *ex vi termini* implies that by the *wilful act*, or the wilful omission of duty of the sheriff, the duties thereby specified shall not be violated by him. The onus was and is upon the plaintiff, and not upon the defendants to establish the issues made by the plaintiff in his assignment of the breaches of the condition of the bond. If, therefore, a demand were necessary to be made of the money claimed, of any person, it should have been made of the party in whose possession, by presumption of law, it was at the time of the demand made, and it should appear that the person so possessed of it refused to comply with such demand, and in this case neither of these essential facts is shown to exist. Therefore, I conclude this point by saying, that the plaintiff hath wholly failed to prove this point of his case, which *he deemed* as I *deem* absolutely necessary to entitle him to judgment, going upon the hypothesis (which we deny the truth of) that the bond sued on embraces within its terms or within its meaning, the supposed breaches of duty, specified in the declaration, as having been violated by the sheriff.

5. That the court erred in declaring the law of the case to be as moved by the instructions asked for by the plaintiff, as well as in refusing to declare it to be as affirmed by the motion of the defendants; and also for not setting aside the finding of the court, and in refusing a new trial for the reasons assigned by the defendants in their said motion therefor,

MARNEY et al, vs. STATE, use of VANCE.

LEONARD for defendant, insists :

1. The authority to make the sale, given to the sheriff by the statute, is *ex vi termini* not only an authority to agree on the terms, but also to receive the purchase money and make the conveyance. Statutes of 1838 and 1839, "Partition," p. 89, 90; also statutes of 1841 and 1842, page 108; 22 Peck. Rep. page 92.

2. The sale being an indivisible thing, he who begins must end it, although his office may have expired. Towble vs. Rayberg, 4 Hammond's Ohio R. 45; State vs. Hamilton, 1 Han. R. 153; 2 vol. U. S. Digest, page 782.

3. Hamilton's first securities, those who were bound for him when he commenced the act, are bound for its due completion. State use of Robey vs. Turner, 8 Gill and John. 125.

4. It was the duty of the officer, after receiving the purchase money, to report that fact to the court and have the money there to be distributed; and his omission to do so, is not only evidence of a conversion, but is itself a violation of his official duty.

Judge BIRCH delivered the opinion of the court.

Vance, using the name of the State, sued Marney and others upon the official bond of Hamilton as sheriff of Boone county. It appears that on the 13th of August, 1841, a judgment in partition was rendered in the Boone circuit court, and that at the December term of the same year, an order was made directing the sheriff to sell the lands at the April term then next ensuing, upon a credit of 6, 12 and 18 months, and to make conveyances upon the payment of the purchase money. The sheriff made the sale accordingly, during his first term, but collected the money, in part, and reported his proceedings during his second term. He collected the balance of the money after the expiration of his second term of office, receipting for it, and transacting the business throughout as sheriff.

The declarations contains two breaches: first, that the sheriff made the conveyance without receiving the purchase money; and secondly, that he collected the money and neglected to have it in court to be paid over to the parties, and had refused to pay Vance his portion, and had converted it to his own use. The plaintiff had judgment for his distributive share of the proceeds of the sale; to reverse which, the defendants who were securities on the first bond of the sheriff, have brought the case to this court.

Was it the *duty* of the sheriff, in virtue of his *first* election, to complete the business of collecting the money and transferring the land? If so, he did not "faithfully discharge all duties imposed on him by his office," and his securities are liable for his default. The mere manner in which he subsequently signed his name, in conducting and winding

up the business, can scarcely illustrate, much less affect the merits of the case.

The views which have occurred to us, upon reference to our various statutes concerning partition, render it unnecessary to choose between, or attempt to reconcile the apparently conflicting authorities to which we have been referred upon the general subject. By act of the 15th of February, 1841, (covered by the bond sued on, and passed before the order of the court alluded to,) the powers and duties previously entrusted to and performed by commissioners in partition, in respect to the sale of the land and all subsequent proceedings, (including the payment of distributive shares) were devolved upon the sheriffs of counties. We throw out of view, in this connection, the additional declaration of the legislature respecting the liability of securities, "in the same manner as in cases collected on execution," such provision being merely cumulative in its application to the facts of this case.

By the second section of the act, the sheriff is authorised to complete such business in partition as he may have commenced during his term of office, including the collection and disbursement of the money, unless the circuit court, by order, direct otherwise, which is not pretended in this case. It became, then, the duty of the sheriff who commenced, to conclude the business, no other person having authority to do so; and the question involved in this suit is in no wise affected by the fact that he was his own successor, and gave a new bond with different securities. He must be presumed to have executed receipts, &c., as "sheriff" under his first term, for he had no authority to act in the premises in any other capacity.

The third section provides a proper compensation for these services, and to deny the authority of the legislature, thus to enlarge the duties of the sheriff, under peril of having thereby no security for its faithful performance, need only to be reflected upon to be abandoned. The recognition of such a principle, having scarce an imaginable limit to its ramification, would virtually close the statute book of the State against all reforms which might concern the receipt and disbursement of money, by the countless officers and fiduciaries of the State, public and private. Such a proposition, therefore, although lying at the root of the only argument which can be adduced against the exposition of the law, as given by the circuit court, requires no refutation, and the judgment of the circuit court is therefore affirmed.

GATES vs. THE STATE.

To authenticate a public record by the *private* seal of an officer, the sealing should be by an impression upon wax or other tenacious substance. A scrawl is not sufficient.

APPEAL FROM BENTON CIRCUIT COURT.

Todd for appellant insists :

1st. The court should have sustained a motion to dismiss the case at the September term, 1848. The record does not show, the court found, a true bill was returned by the grand jury. It does not show an order of court receiving the indictment as found, a true bill. It does not order the filing of the indictment, and no order appears for process upon it as a matter of record, and the indictment was not filed as a record in court.

2nd. The record of the Moniteau circuit court of the 6th of October, 1848, containing a copy of that of Morgan circuit, made out on the 21st April, 1848, should have been rejected on the trial for these reasons:

First. The seal of the clerk of Moniteau was not an official seal, being made with a scrawl around the initials L. S. By common law no sealing was legal but with impressions on wax, or tenacious substances. See Tomlin's L. D., title "seal," p. 441.

Second. A clerk's private seal is allowed by statute. See Rev. Code, p. 203, sec. 19, where there is no official seal. It is contemplated by statute that all official seals shall be impressions on wax or stamps on paper. See Rev. Code, p. 332, sec. 18, 19. Official seals are intended to be evidence of authentication by inspection. Our statutes allow scrawls as a substitute for sealing in private contracts only. See Rev. Code.

3rd. It should have been rejected for want of intrinsic evidence to prove the charge in the indictment. It fails to prove that a grand jury was empanelled or sworn at the October term, 1847, of any report from them of the presentation of this or any bill of indictment, of any order of the court filing the bill ordering a *capias*, or in relation thereto.

4th. If any such inference is deducible from acts of the court, yet in fact, the paper is not an indictment.

First. The bill is not signed by any prosecuting attorney, if that is not necessary.

Second. It is not signed by the grand jury or any foreman thereof, and there is no endorsement of a "true bill" signed by "the foreman;" and without such finding, and no record of such finding, the presumption of law, always in favor of criminals, would be, it was returned as "ignored," or not a true bill, and all subsequent acts of the court "void absolutely."

Third. The evidence in the record of the pendency of the cause by indictment, is matter of law alone for the court, and in law exists from the time of filing the record in the Moniteau circuit. This record does not show when it was filed in said court, other than by inference from the court acting on the case on the 25th of September, 1848. It had no tendency to prove the charge in the indictment of a prosecution for perjury, pending at the time of the commission of the offence, and was incompetent and irrelevant evidence.

Fourth. The amended record of the Moniteau circuit court, on the 28th day of June, 1849, was illegal and incompetent evidence for these reasons:

1. It was only evidenced by the clerk's certificate, authenticated by a scrawl for a private seal of office, which is no seal. See cases under point 2.

2. The clerk under the rule of the Benton circuit court, of March term, 1849, could not legally make a record of any papers filed, or attempted to be filed in his office, in that crim-

nal cause, the venue having been changed in Sept. 1848, and filed in Benton circuit court in Oct. 1848.

3. The supposed manuscript from Morgan circuit, filed in Moniteau, on the 26th May, 1849, was no part of the records of Moniteau; it was not filed by original suit, or an order of change of venue, on rule or certiorari from Moniteau circuit, or in any case there *pending*. It was an illegal and void act to file it.

4. The circuit court of Morgan had no authority to send a transcript to any court where the cause was not *pending*, and then only upon rule or certiorari: the order of the court was extra judicial and void. See statutes change of venue and 7 Mo. Rep. 206.

5. If evidence for any purpose, it was deficient in this; that the circuit court of Morgan at October term, 1847, never *adjudged* that the indictment was found *a. true bill*, ordered it *filed* as a record in court, or ordered a *capias* thereon. Rev. Code, p. 866, sec. 21.

5th. The court erred in not giving defendant's instruction to find him not guilty, unless absolute threats of injury for appearing or not testifying.

6th. The motion to arrest should have been sustained for defects stated in the indictment, and secondly for defect in proceedings stated in point 1st to dismiss.

ROBARDS, Attorney General, for the State.

1. The court did right in refusing to strike the cause from the docket.

2. The indictment is good.

3. The instruction asked by the State, and given, contains a correct exposition of the law, applicable to the case, and the court did right in refusing to give the second instruction asked by the defendant.

4. The records admitted in evidence were properly authenticated and were admissible. Digest, page 332.

5. The transcript from Morgan to Moniteau county was filed in the latter court on the 18th June, 1848, and the offence was proven by the witness to have been committed in September, 1848, and subsequently to filing of the cause in Moniteau county.

Judge BIRCH delivered the opinion of the court.

The only point of disconcurrence between this court and the court below, has relation to the authentication of the record by the clerk of the Moniteau circuit court, from whence this cause was taken by change of venue. As we are not sitting to enact, but to administer laws, it may be sufficient to remark, that probably no judicial decision can be found which recognises any other mode of sealing, at common law, than by an impression upon wax or other tenacious substance, and as our own legislature, which has re-enacted the common law, has only so far modified the ancient legal method alluded to, as to allow *official* seals to be impressed or stamped upon paper alone, the *private* sealing of a clerk, as contemplated and permitted by the 20th section of the statute respecting courts, must needs continue to be conformed to the original legal definition, the clerk being simply permitted to use his "*private seal*" instead of the *public* one, which was unprovided. The

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5th section of the "act concerning contracts and promises," having no application in a case respecting records, the "*scrawl*" which was affixed to the signature of the clerk cannot be regarded as in any wise imparting the legal authentication of a record, and the reading of such a paper in evidence against the plaintiff in error, was consequently inadmissible and erroneous. The judgment of the circuit court must, therefore, be reversed and the cause remanded.

SCOTT vs. McCULLOCK ET AL.

A sold to B and C a tract of land—executed a deed acknowledging payment of the purchase money. Below the deed and before the certificate of acknowledgment, there was a memorandum (purporting in the body to be the act of both, but was signed by B alone,) stating that one of the payments was still due, and that the land was bound for the payment of it. Before this deed was recorded B and C sold and conveyed the land to D. A filed a bill to subject the land to payment of the purchase money.

Held, that the memorandum at the foot of the deed was sufficient to charge D, the subsequent purchaser with notice of the lien.

APPEAL FROM MONITEAU CIRCUIT COURT.

HAYDEN for appellant insists :

1. That the deed from appellant conveying the land to James H. and Burwell Taylor, and the memorandum thereunder, written, signed and sealed by said James H. Taylor, are parts and parcels of the same transaction, and are component parts of one entire contract, and should be construed together in determining upon the meaning and intent of the parties thereto. 3rd. Bibb 11, Williams vs. Handley, 15 John, Rep. 569, Dunham vs. Deig, Pouell on mortgages p p. 6, 7, 1 Foub. Eg. chap. 6, sec. 14 p. 436. 10 Mass. Rep. 336. 13 Pick. 165, 167; 5 Pick 181, Stocking vs. Fairchild; 10 Pick. 302, Makepeace vs. Howard College; 10 Pick. 249, Sibley vs. Holden; 13 Mass. 87, Hartshorn vs. Penniman, Minot's Digest, title contract, construction of article 8, letter C. page 158 and the authorities there referred to; 4 New Hamp. Rep. 171 Emerson vs. Murray; 2d. U. S. Digest title Deed letter V. 1 Greenleaf Ev. sec. 22, 23, 24, 25, and notes thereto; 8 Mo. Rep. 51, Nicholls Adm'r of Smith vs. Douglass et al; 7 Mo. Rep. 441-2. Powell & Powell vs. Thomas.

2. That by that part of the contract which was signed and sealed by the said James H. Taylor, an express lien was created and fastened upon the land, forming the subject of the contract for the payment of the remainder of the purchase money, and in law is a mortgage upon the land. Minot's Digest title mortgage p. 487 and cases there referred to; 4 Mass.

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Rep. p. 444; 2 Summers Rep. 531-2 &c. Powell on mortgage p. p. 6, 7; 7 Cranch 237, Conway's Ex'rs vs. Alexander; 1 P. Williams 270—Floyer vs. Savington—King vs. King 3 P. Will. 360.

3. That by the pretended sale of the land by the said James H. and Burwell Taylor to Ravenscroft Taylor, he took it with knowledge of the said express lien upon it, and therefore he holds it subject to the debt charged upon it. That he is estopped to deny notice of the incumbrance, because he denies title under the *very deed and contract* by which it was created and was bound in law to look into the title of his vendors at the time of his purchase; and in doing so, the only title paper which he could and must have seen, was and is the one which shows the incumbrance upon its face, and if he did not see it, or closed his eyes upon it, he is chargeable with gross negligence, which does not heighten his claims to the protection of a court of equity in this controversy with Scott; 2 vol. Sugden on vendors, p. p. 322, 339, 340; 3 Howard's U. S. Rep. 410, Oliver et al vs. Siatt; Willis vs. Bucher; 4 Binney 231, 314; 2 Binney 466; Cuyler vs. Bradt; 2 Caines cases in error 326; 6 Berin 119; Campbell ads. Irvine; 2 vol. Cruise's Digest, chap. 5, secs. 62, 63 and authorities there referred to, pages 230, 231; 2 Edin. chancery Rep. 165; do page 242, 243, note (a) top paging; 2 vol. Pirtle's Digest p. 315, sec. 28; 4 Little Rep. 317, Johnson vs. Gathaway &c.; 2 Vernons Chy. Rep. 662, Draper's Company vs. Yardley; 1 Marsh. Rep. 58, Cotton vs. Hart; 7 Monroe 559, Nantz vs. McPherson; 2 ver. Jr. 437, Taylor vs. Stihert; 1 Salkeld, 285, Ford vs. Gray; 1 Phillips Ev. 410, 411; 1 Greenleaf Ev. Title Estoppel secs. 22, 23, 24, 189, 204 and notes thereto; 6 Peter N. P. 611; 4 Peter's 1, 83, 88; Carver vs. Jackson, 7 Conn. 333; 3 Conn. 146, 150; 9 Conn. 287; 2 Brown Chy. Rep. 312 note (b); Newland on contracts 510; 6 Watts & Sergt. 472, 473.

4. That the proofs in the cause show, independent of the presumption of law, mentioned in my third point, that Ravenscroft Taylor, did see the said deed of conveyance from Scott, with the memorandum appended thereto, at the time of the execution of the conveyance to him by the said James H. Taylor—see the evidence of Judge Fulks in the bill of exceptions; and the proofs also show that the transactions between the said James H. and Burwell Taylor, with their brother Ravenscroft Taylor, were *malafide* and merely made to present, hinder and delay the complainant and others from collecting their lawful demands.

5. That the complainant, Scott, as against Ravenscroft Taylor and his legal representatives, independent of the express lien, above mentioned, has a lien *in equity* upon the land for the said purchase money, as will appear from the evidence preserved in the bill of exceptions, which shows that Ravenscroft Taylor never did pay any thing for the land, except a negro woman Lucy (the property of his mother, worth from \$250 to \$300, which was paid to Burwell Taylor, and which if admitted to be an *honest and bona fide transaction*) which is denied would leave in behalf of the complainant an ample security in the land for the claim he asserts against it; and therefore the court below erred in not decreeing a sale of the land and marshaling the proceeds of the sale according to the equities of the parties, if the defendants have any equity therein; 6 Monroe 198, 199, Bleights heirs vs. Banks &c.; 5 Little Rep. 62; Hunter vs. Simerall &c.; 2 Pirtle Digest 475; 4 Bibb 239; 5 Monroe 198; 1 John. Chy. 301, Fros vs. Beckman; 2 Pirtle 315, sec. 28; 1 Monroe Rep. 237, Hackwith vs. Damron &c.

RICHARDSON for appellees insists :

1. That the equitable lien of Scott for the balance of the purchase money for the land, can not be enforced against the appellees, without proof of notice by Ravenscroft Taylor, or the non-payment of the purchase money by his grantors; 6 Monroe 198; 1 John. Chy Rep. 300.

2. That in this case, the question of notice is a question of fact, and there is no proof that Ravenscroft Taylor had actual notice.

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3. That although between Scott and James H. Taylor, the memorandum on the deed would be construed as an equitable mortgage, yet as to Ravenscroft Taylor, it would only be a declaration of James H. T., that a part of the purchase money remained unpaid, and a knowledge of that declaration must be brought to him.

Judge BIRCH delivered the opinion of the court.

On the 9th of October, 1846, the complainant sold to James H. and Burwell Taylor, certain lands in the county of Moniteau, for the sum of a thousand dollars, which he acknowledged himself to have received from them in the body of the deed, but which, by a memorandum made directly under the deed, and before the certificate of acknowledgment, it appeared, had not all been paid. That memorandum was in these words: "One of the payments constituting a part of the within consideration of this conveyance, is a bond due the first day of January, one thousand eight hundred and forty seven. We James H. Taylor, and Burwell, the persons to whom this conveyance is made, do hereby agree that it is distinctly understood by us, that the within named parcels of land conveyed, are still held and firmly bound for the faithful discharge of the aforesaid bond, due on the first day of January, 1847, which was executed and subscribed by us for the sum of three hundred dollars. Witness our hands and seals *the day and year aforesaid.*" This memorandum was signed by James H. Taylor, but not by Burwell. Shortly afterwards the two Taylor's sold the land in question to their brother, Ravenscroft Taylor, and the three hundred dollar payment, recited in the memorandum, having never been made to Scott, who has a judgment for it at law, he seeks by his bill to subject the land to its payment. The only question, therefore, which it becomes necessary to consider, is was the memorandum thus standing upon an unrecorded deed, sufficient to charge the subsequent vendee, with notice of the lien originally retained. The loose and too confiding custom of the country, whereby lands are so often sold and transferred without reference to the precedent uneminent of title, has been courteously and ingeniously invoked by the counsel for the appellees, as a reason for relaxing or modifying the early and steady English rule upon the subject of notice. It has failed to convince us, however, of any thing except that reliance is too often misplaced, either in the uprightness of grantors or their ultimate ability to make good their covenants of warranty, while the reflection thus suggested, and again given to the general subject, has but the more impressed us with the propriety of standing by the original rule alluded to. It is written by Sugden in these words: "What is sufficient to put

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the party upon an inquiry, is good notice, and therefore, in all cases where the purchaser cannot make out a title but by a deed which leads him to the real fact, whether by description of the parties, recital *or otherwise*, he will be deemed conversant thereof." Applying the rule they quoted, to the facts in the present case, it should be noted, first, that Scott never parted with his land, except as denoted by a paper which it was impossible to read without encountering a memorandum, which would at least put a subsequent purchaser upon enquiry and lead him to the real fact" (as subsequently established in the suit at law) namely, that a portion of the purchase money was unpaid. Ravenscroft Taylor, then, must be deemed, either to have had sufficient notice of the equitable lien of the complainant or to have contented himself with the warranty of his brothers. If he has been mistaken in the latter, such sympathy as may be felt for his children, cannot be indulged at the expense of others, much less at the expense of one of the most beneficent and least erring principles of our jurisprudence. To say nothing then, of other concurring circumstances in this case, the judgment of the circuit court must be reversed, and the cause remanded for a decree in conformity with this opinion.

Concurred in.

JOHN F. RYLAND.

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1. Upon a petition or bill for divorce, brought by a husband against his wife, charging her with adultery, evidence of her *general good character* is admissible.
2. Where a chancellor directs issues of fact to be made, which are tried by a jury, the finding is to be regarded as verdicts at common law. The supreme court will not disturb them except in a case of clear and improper finding or of misdirection by the court.

ERROR TO COOPER CIRCUIT COURT. (IN CHANCERY.)

STATEMENT OF THE CASE.

This was a bill filed by a husband against his wife, on the 6th of December, 1847, in the

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Cooper circuit court, for a divorce upon the ground of adultery. The adulteries are charged to have been committed in Cooper county on various occasions, in the year 1844 and 1847 with Thomas Saunders, John Saunders and Eli Cuthrell. The defendant in her answer denied the charges, and at her instance issues of fact were ordered by the court, made up and tried by a jury at the last March term.

Upon the trial, it appeared that the parties had been married several years, had always resided in Cooper county, and had several children. Cuthrell lived in the neighborhood of the plaintiff in 1844, and was a young man and unmarried. John and Thomas Saunders were married men, and lived in the plaintiff's neighborhood in the year 1847, and previously. In March 1847, the plaintiff went to the State of Arkansas on business, and was absent about six weeks. Upon his return, he enquired of his wife how things had gone during his absence, and was informed by her, among other things that Thomas Saunders had been very kind to her, was her best friend, and that without him, she would have suffered. Shortly after this, the plaintiff's negro woman informed her master, that during his absence, she had on one occasion, caught her mistress and Thomas Saunders together under suspicious circumstances, and that her mistress manifested a great deal of confusion, when discovered. The plaintiff communicated this to his wife, who at first denied the meeting between herself and Saunders; but afterwards upon being confronted by the woman at her own request, confessed all except the embarrassment. The plaintiff, after this, meeting with Saunders, had a quarrel with him on account of his conduct towards his wife, and in the course of the quarrell, Saunders made some charges against her. The plaintiff communicated these charges to his wife, who then told her husband that Saunders had insulted her by proposing illicit intercourse. The plaintiff's suspicions being now excited, he pressed his wife to tell him all that had been done, and she finally confessed having had intercourse with Saunders, during the plaintiff's absence. The plaintiff after being satisfied of his wife's infidelity, ceased co-habiting with her, and finally on the 6th of December, 1847, filed the present bill for a divorce, and a few days afterwards, the defendant voluntarily abandoned her husband's house, and went to her brothers, who resided in the same county.

These facts were disclosed by the testimony of Jordan O'Bryan, the plaintiff's brother, who learned them from the conversations he had with the defendant. The same day the bill was filed and after the plaintiff had told his wife what he had done, she confessed her guilt, in the presence of John L. O'Bryan.

Two witnesses, Caleb O'Bryan and Dixon O'Bryan, prove improper familiarities between the defendant and Thomas Saunders.

One witness, Jordan O. Taylor, proves that the defendant, after her husband's return, met Saunders in company and went to his house, as she had previously done.

Two witnesses, Mrs. L. Elliot and Simon Lewis, also prove improper familiarities between the defendant and Cuthrell, and proximate acts of adultery, although there is no direct proof of the commission of the very fact.

One witness (Elizabeth Saunders,) testified to indecent familiarity on the part of the defendant with John Saunders, during the plaintiff's absence; and John Saunders swore directly to two acts of adultery, that he had committed with the defendant, during her husband's absence in Arkansas.

This was all the plaintiff's evidence. The evidence on the part of the defendant, consisted in the testimony of two or three witnesses against the character of John Saunders as a man of truth: in the testimony of ten or twelve persons in relation to the good character of the defendant as a woman of chastity and general virtue: in the deposition of Thomas Saunders, who denies having committed adultery with the defendant, but testifies to gross familiarities and lewd conversations with her; and finally in an affidavit made by the defendant before a justice of the peace of Cooper county, on the 16th of December 1847, for the purpose of originating a prosecution against Thomas Saunders—that he had committed a rape upon her some time in the previous March or April.

The plaintiff objected to the defendant's evidence in relation to her character, but the court

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overruled the objection, and allowed the evidence. The jury found all the issues for the defendant; and the plaintiff moved to set aside the verdict and for a new trial because the finding was against the evidence, and on account of the admission of improper testimony.

This was refused, and the complainants bill dismissed, and the cause is now here by writ of error.

LEONARD and HAYDEN for plaintiff, insist :

1. The verdict is palpably against the evidence. No one who has any knowledge of human nature or is at all conversant with the world, can doubt the defendant's guilt after having heard the proof that was given. Of her guilt with Thomas Saunders, there is the evidence of the proximate acts, and her own solemn confessions of guilt, made first to her husband in private; and then repeated to him in the presence of his near relations. There is also her own affidavit, swearing directly to the carnal knowledge in March or April, with the poor pretence made for the first time in December, and after the bill was filed, that it was effected by force. No complaint is made when the wrong was done. Upon her husband's return, she utters in his ears, words of praise in favor of the man who has ravished her. She meets him in company, and even goes to his own house as she had previously done. At last after all this, when the bill is filed, after the lapse of nine months, the poor excuse of a rape is thought of, and sworn to, and then she takes her ravisher's deposition, and when he denies all carnal knowledge of her, the prosecution is at an end, and the wrong done is left to go unpunished. Of her guilt with John Saunders, there is the evidence of her indecent familiarity with him, and his own oath swearing unequivocally to two acts of adultery that he had committed with her, a fact concealed from all till it is drawn out of him by a judicial examination; and then told in such a manner and with such minuteness of circumstances as to leave no doubt of its truth. Even in actions at law, where the verdict is palpably against the evidence, the rule of this court is to reverse the judgment and order a new trial. *Hartt vs. Leavenworth*; 11 Mo. Rep. 630.

But in equity new trials in feigned issues, are awarded in cases where they would be refused at law. The chancellor weighs the evidence, even nicely and grants a new trial, if the verdict is unsatisfactory to him. *State vs. Mabbot*; 2 ves. sen. 552; *Lord Talconberg vs. Pierce*; 1 Ambler 210; *Cleeve vs. Gascoigne*, 1 Amb. 323; *Williams vs. Williams*, 4 Eng. Eccles. Rep. 415; *Ostley vs. Ostley*, 3. Eng. Eccles. Rep. 305, 306; *Grant vs. Grant* 7 Eng. Eccles. Rep. 16.

2. The defendant's good character, was clearly inadmissible in evidence upon the trial of these issues. In direct public prosecutions for crimes, and in civil cases, when the party's character is put in issue by the suit, it may be given in evidence. Here, however, the party's character was not in issue, in the technical sense in which the term is used, and there is no ground whatever, it is believed, for allowing the evidence. 2 *Phillips Ev. with Corven and Hill's notes*, 456, 457 and cases there cited; 2 *Stark. Ev.* 365, title "character;" *Atty. General vs. Bowman*; 2 *Boz. and Pull.* 532; *Humphrey vs. Humphrey*, 7 *Conn. R.* 116; *Fowler and others vs. Gtina Insurance Co.*; 6 *Corven's Rep.* 673, *Andersons ex'rs. vs. Long*; 10 *Seargt. and Rawl.* 61.

ADAMS, STUART and MILLER for defendant, insist :

1. The verdict must stand unless there be a glaring deficiency in the evidence.
2. It is the province of the jury to weigh the testimony, and though the court might not have found the same verdict, it cannot for this reason be set aside. *Campbell & Mason vs. Wood*, 6 Mo. 218; *Todd & c. vs. Boone county*, 8 Mo. 437; *Tiffany vs. Foster*, 8 Mo. Rep. 614; *Fulkerson vs. Bollinger*, 9 Mo. Rep. 338; *Watts vs. Douglass*, 10 Mo. 676.

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3. In this case, the weight of evidence is clearly with the verdict, and in fact it would have been an outrage to have found otherwise.

Judge RYLAND delivered the opinion of the court.

From the above statement, two points present themselves, for the adjudication of this court.

The first is the admission of the evidence of the defendant's good character: and the second, the refusal of the Court, to grant a new trial. If either of these points be ruled for the complainant, this case will have to be remanded.

It is a general rule, that evidence of a general character is not admissible in civil suits: but to this general rule, there are many exceptions. Greenleaf in his treatise on evidence, vol. 1, sec. 54, says: "In civil cases such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it." "And generally in actions of tort, whenever the defendant is charged with fraud, from mere circumstances, evidence of his general good character, is admissible to repel it—so also in criminal prosecutions the charge of a rape, or an assault with intent to commit a rape, is considered as involving, not only the general character of the prosecutrix for chastity, but the particular fact of her previous criminal connexion with the prisoner." "And in all cases where evidence is admitted touching the general character of the party, it ought manifestly to have reference to the nature of the charge against him."

There is no doubt, that in criminal prosecutions, the general good character of the defendant, is legitimate evidence. Formerly, this kind of evidence was allowed to defendants in capital cases only; but this rule has been so much relaxed in modern practice, as to admit such evidence generally in all criminal prosecutions.

The rules of evidence have their foundation in plain common sense. They were adopted as the means of eliciting the truth; of unfolding and bringing to light the facts connected and involved in the various transactions of life, which might become the subjects of judicial investigation; as well as to afford facilities to the legal enquirer, in his often obscure and difficult searches to find the motive and the will which prompt and produce such transactions. In the nature of things, it is impossible to establish and fix any number of uniform and general rules, which might not bear oppressively severe on some individual cases. Hence the great number of exceptions to be found to these general rules. I know of no situation, in which in a civil suit, a defendant can be placed, where gen-

eral good character can be of more importance to her, than in a proceeding for a divorce, upon the charge of infidelity to her husband.

The charge of adultery, involves directly the character of the defendant. It partakes deeply of the nature of a criminal proceeding. It is highly penal in its effects. Convict the defendant of the charge, and the law deprives her of her property, of her children, of all that is dear to her, and turns her as an outcast upon the world, a miserable and degraded being. The only defence to such a charge, especially if it be false may be her good, her spotless character: deprive her of the right to offer that before the jury, and the consequence will be, that to charge and to convict, will be almost convertible terms. In the case of *Gregory vs. Thomas*; 2 Bibb. 286, which was an action for a malicious prosecution, the defendant justified, by pleading what causes and grounds he had to prosecute the plaintiff: and on the trial, the circuit court permitted the defendant to prove any particular charge or imputation of theft of any kind, which had been committed by the plaintiff at any period of his life, though unconnected in circumstances with any matter of fact specially alleged in the pleadings. The court of appeals reversed the judgment, stating that the court below ought not to have permitted the enquiry to have extended further, than the plaintiff's general character. In the case of *Humphrey vs. Humphrey*, 7 Conn. Rep. 116, which was a petition for a divorce, the cause as signed was the defendant's adultery; the court below admitted the defendant to give evidence of her general good character; but the supreme court reversed the judgment of the court below, for this reason, Judge Peters dissenting. This decision of *Humphrey vs. Humphrey* was afterwards cited by the supreme court of Alabama, see *Ward & Thompson vs. Herndon*, 5 Porter 382. In this last case, the court uses the language of chief justice Tilghman, in the case of *Anderson's executors vs. Long and others*, 10 Serg. and Ran. 61, as follows: "But putting character in issue is a technical expression, and confined to certain actions from the *notice* of which, the character of the parties, or some of them is of particular importance." "But it never has been supposed that character is put in issue merely by the charge of fraud, made by one party against another." In the above quotation from chief justice Tilghman, I have no doubt the word *notice* is put by mistake for *nature*.

In actions of crim. con. slander, malicious prosecution, the general character is given in evidence, in order to enable the jury to place a proper estimate thereon, in damages in dollars and cents. In cases like the one now before the court, although the jury do not assess damages,

yet, by their verdict, they can affect the character of the defendant, in a most important manner. Their verdict does not estimate, does not value the character; but it may strip it of all that is dear and leave it a blighted withered object, for "bitter scorn and lasting infamy." This doctrine is tinctured with that absurdity, which teaches us to take care of the shadow, however, we neglect the substance. Viewing this proceeding, therefore, as a pure and unmixed civil one, I am satisfied, that every consideration, every inducement, which have heretofore permitted evidence of general character, to be given in cases of crim. con. slander, malicious prosecution, should permit the same evidence in a petition or bill for a divorce, where the charge is adultery. But I am warranted by authority in considering this case as partaking of the nature of a criminal proceeding. The supreme court of Pennsylvania, in the case of *Ganat vs. Ganat*, which was a libel for a divorce, 4 Yeates 244, treats the proceeding as a criminal one: and chief justice Gibbon, in the case of *Matchin vs. Matchin*, 6 Bars. Rep. 336, says "a libel for a divorce is said to partake of the nature of a criminal proceeding." I am free to declare therefore, upon a full consideration of the cases and authorities cited, that evidence of general good character, in a proceeding by petition, or bill in chancery, charging the defendant with the crime of adultery, should be admitted by the courts of this State. Such evidence comes fully and completely within the exception above cited from *Greenleaf*. By permitting the defendant to give proof of general good character for chastity, the complainant cannot be injured. He has the privilege of rebutting, by the same kind of evidence; but deprive the defendant of this privilege, and irreparable injury may follow. Let us look at the consequences which may result from the doctrine contended for by the complainant's counsel. A virtuous woman may be falsely charged, and the same villany which could fabricate the charge, could accompany it with such "mode and circumstance" as to leave the defendant no power, from extraneous circumstances, to disprove it. She must rely upon her good name: her only hope of safety, is in that homage which the wise and good invariably and involuntarily pay to virtue under suffering and misfortune. I am unwilling to aid or assist in depriving her of this humble privilege, which is allowed to the defendant, in a criminal prosecution for petit larceny. I find no error therefore on this point.

I will now consider the second point, the overruling the motion for a new trial.

By the statute concerning "Practice at Law," article VII, sec. 3,

only one new trial shall be allowed to either party, except, first, "where the triers of the fact shall have erred in a matter of law:" secondly, "where the jury shall be guilty of misbehavior."

By the statute concerning "Practice in Chancery," article III, sec. 9, "the court may award a new trial of any issue upon good cause shown, but not more than one new trial of the same issue, shall be granted to any one party." From the great resemblance these statutes bear to each other, on the subject of new trials of issues, I am inclined to think that the practice of this court should be the same, as regards them. In appeals from the decisions of the circuit courts in chancery cases, this court examines all the evidence, looks into the facts of the case and makes such an order and decree as we think the court below should have made. But in the cases where issues of fact have been made up, under the direction of the chancellor, and tried between the parties, we look upon the finding of the jury, upon such issues, as verdicts at common law; and when the chancellor, before whom these issues have been tried, upon motion refuses to have them tried anew, by setting aside the first finding, I must see a clear and obvious case of improper finding by the triers, or of misdirection by the court, before I will interfere. In this case, now before the court, I am unable to see any good reason, why this court should depart from its former course of practice and decision in regard to new trials after verdict of the jury at common law. Here were issues of fact made up and tried before a jury, under the eye of the chancellor. A motion was made to grant a new trial, the chancellor overruled it, thereby declaring his satisfaction with the finding of the jury; at the same time negating the idea that there was, in his estimation *good cause* for his interference with such finding. This court is not called on to say whether it would have found the same verdict or not—whether it is satisfied with the verdict or not. The jury was the proper tribunal to try the issues. Before the jury the witnesses were produced face to face. In all probability the jury knew all the witnesses and could see the manner of each witness in relating his testimony; could put faith and credit to such witnesses as the jury supposed deserved them, and pass over such as in their opinion, were not entitled to credence. There was testimony on both sides of these issues; and the jury having found their verdict. I am unwilling to disturb it. The decree of the court below, is therefore affirmed.

Concurred in.

JAS. H. BIRCH.

HUNTER et al, vs. REINHARD.

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A judgment confessed before a justice of the peace on a day not his law day, is void.

ERROR TO LAFAYETTE CIRCUIT COURT.

YOUNG & FIELD for plaintiff.

1. The only point raised in the court below, and it is the only point in dispute, is whether the judgments by confession, rendered by the justice, on a day different from the day set by him for his law day, is void. The judgments rendered were within the jurisdiction of the justice, and the requisites of the statute being complied with, the justice had the power to render said judgments on any day. 1 and 2 secs. of the 6th article under the head "justices' courts," Revised statutes of 1845.

2. The law gives no day for justices to hold their courts, and the day for the trial of causes before justices of the peace, is set by themselves, and is unknown to the law; and if a justice could render a judgment by confession only on the day set by him for the return of summons, then the validity of every judgment rendered by confession before a justice of the peace, will depend upon matters in *pais*.

3. The statute requires every justice of the peace to appoint a day every two months for the return of summons issued by him, and requires every summons to be made returnable on that day. 1st sec. 2 article, under head "justices' courts," Revised statutes, Mo., 1815; and we claim and contend that there is nothing in this statute to prevent a party from appearing before a justice of the peace, on any other day than his law day, and confess judgment.

HAYDEN for defendant.

1. That the judgment of the justice of the peace, rendered in favor of the plaintiffs in error against the said George M. Grant, were and are null and void, and that the execution issued upon the transcript thereof, as well as the levies and sale of the lot to the said Richard, in virtue thereof, are also void, and that, therefore, the circuit court committed no error, either in sustaining the motion of said Richard to set the sale aside and to refund him the purchase money, nor in the overruling the motion of the plaintiffs. That the judgments are void, because they were rendered in vacation time by a justice out of court, and not in *term time* by the court of a justice of the peace.

2. That a justice of the peace has no power given in the statute to hold his terms or law days more frequently than one day in every two months, but on the contrary, the very fact that the statute provides for the holding of his terms once every two months, negatives the idea that he can hold them oftener. The court and its jurisdiction, and mode of proceedings, are mere creatures of the statute, and the justice can exercise no power, nor the power as given, otherwise than the statute prescribes, and therefore can only render judgment in term time.

3. That the fact that the justice of the peace has power given him to fix or point out the time of holding his courts, instead of having the terms fixed by the statute, as is the case as to the terms of the circuit courts, does not warrant a justice to render a judgment, *as a justice*, in vacation time, any more than a judge of the circuit court can render a judgment in vacation time, so as to give validity to it; the reason for the objection being the same in both jurisdictions.

4. That public policy is opposed to the judges of courts, whether inferior or superior, rendering judgments as they are travelling or moving about in vacation time. Creditors, by per-

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mitting such a course of practice, will be in danger of losing their honest claims against fraudulent debtors, by having swept away beyond the reach of their process, (obtained at regular terms) the effects of the debtor, by executions issued upon *secret* judgments thus confessed, for debts not due, nor ever thought of.

RYLAND, Judge.

The points involved in this case are, in principle and in fact, so very similar to those decided by this court at last October term at St. Louis, in the case of Oyster and Shumate, that we refer to the opinion of the court in that case, and adopt it as the one governing this.

The judgment of the circuit court is therefore affirmed.

Judge BIRCH, concurring.

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Upon a proceeding under the act "concerning boats and vessels," no process can issue against a boat until a bond is filed.

ERROR TO JACKSON CIRCUIT COURT.

STATEMENT OF THE CASE.

This was a complaint under the statute against the steamboat Archer, for the mal-performance of a contract of affreightment, in consequence of which, the plaintiffs goods shipped on her, from St. Louis to Wayne city, in Jackson county, were damaged by water through the negligence of the boat.

No bond for the prosecution of the suit was filed at first, pursuant to the act of 1847. But after the boat was seized, and before the return of the writ, the owners bonded here, and at the return term, a motion to dismiss, for want of a bond, was overruled upon the plaintiffs then filing a proper and sufficient bond.

Judgment was afterwards given by default for want of a plea, an inquisition of damages had, and a final judgment rendered against the principal and sureties in the bond.

The questions in the record relates to the sufficiency of the complaint and the propriety of allowing the plaintiffs to supply the want of a bond at the commencement of the suit by filing one "*nunc pro tunc*."

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HOVEY, for plaintiff, insists :

1. That the writ was issued without authority of law, and that all acts done under such writ were a mere trespass. See acts of 1847, p. 11, 12, Bacon's Abridgment, title "Statute," letter J; Peter's Rep. vol. 2, p. 662; Cond. Rep. vol. 1, p. 337 & 421; 3 Howard's Rep. p. 556.
2. That the court below ought not to have permitted the plaintiffs below to file their bond "nunc pro tunc," but should have dismissed the suit on motion. See Stephenson & Hord vs. Robbins, 5 Mo. Rep. p. 18.
3. That the court below erred in rendering judgment by default against the boat, after boat had been released by the bond. See Rev. Statutes, p. 185, sec. 21.
4. That the charges in the complaint are neither against the boat nor the owner, and the complaint does not allege any contract on the part of the boat, her officers, agents or owners, to convey or deliver the goods. See stat. "boats and vessels," sec. 1, page 4.
5. That this court will do what the court below ought to have done, dismiss the suit.

LEONARD for defendant insists :

1. The complaint is sufficient. It describes the plaintiff's demand "in all its particulars, and on whose account it accrued." Rev. Statutes, 1845, p. 182, sec. 4.
2. It was competent for the circuit court to allow a bond for the due prosecution of the suit, to be filed "nunc pro tunc," and when filed it supplied the original defect in the proceeding. The proceeding was *irregular* for want of a bond not *void*. The circuit court is authorised by the statute to amend any process, pleading or proceeding in any civil action, either in form or substance, for the furtherance of justice, on such terms as may be just, at any time before final judgment. This amendment was for the furtherance of justice. It promoted a speedy administration of the law, benefitted both parties, and did no injury to either. It saved the plaintiff the expense and delay of a new suit, and furnished the defendant security for any wrong that had been already done him. Wigfall vs. Byne, 1 Richardson's Rep. 412; Camberford vs. Hall, 3 McCords. Rep. 345.
3. Admitting, however, that a bond cannot be filed "nunc pro tunc," so as to supply the original defect, and that the seizure must be annulled and the property restored, unless the bond is "first filed," it does not follow that the suit which, by the voluntary act of the parties, has become a proceeding "*in personam*," will be dismissed. One object of the seizure is to bring before the court the persons personally responsible, and when this is effected, the warrant is so far *punctus officio*; the boat is released, and the suit proceeds against those who have voluntarily become parties to it. Callender vs. Duncan, 2 Bailey (S. C.) R. 454; Young vs. Gray, Harper's Rep. 40; Rev. Stat. 1845, p. 182, secs. 9, 21. This court decided in Hord & Stephenson vs. Robbins, that a bond could not be given "nunc pro tunc," so as to preserve the lien of the attachment, but has never decided that if there be no bond the suit shall be dismissed. In Whiting & William vs. Budd, 5 Mo. Rep. 444, and in King vs. Evans, 7 Mo. Rep. 411, it was decided that an appearance to move the court to quash the attachment, is an appearance to the suit; and the parties must plead or submit to a judgment by default. Here the defendants, by giving the bond, became defendants to the suit, by the express provisions of the statute.

RYLAND, Judge, delivered the opinion of the court.

The statement of facts presents to this court two points for our adju-

dication : First. The sufficiency of the plaintiff's complaint filed in the court below against the boat : Secondly. The act of the court below in permitting the plaintiff's to file their bond to prosecute the suit, after the boat had been seized, "*nunc pro tunc*."

The plaintiff in error abandons the first ground, and we shall, therefore, say nothing on that.

The second point is one of more importance. By the act supplementary to an "act concerning boats and vessels," passed at the session of the General Assembly of 1846 and '47, it is declared, sec. 1 : "In all cases of attachment against a boat or vessel, under an act concerning boats and vessels, approved March the twenty-sixth, eighteen hundred and forty-five, the plaintiff, or some person for him, shall first execute a bond in conformity to an act to provide for the recovery of debts by attachment, approved March the fourteenth, eighteen hundred and forty-five, the condition of which shall be, that he will prosecute his suit with effect, or pay all damages that may accrue to the boat or vessel, or the owners and officers thereof, by reason of said attachment, or any process or proceeding in said suit."

By this statute it will be seen that the bond of the "plaintiff, or some person for him," shall be first executed in conformity to the statute, providing for the recovery of debts by attachment.

This court in the case of Stephenson & Hord vs. Robbins, 5 Mo. 18, decided that under our attachment law, the bond which was required to be filed before the writ could issue, could not be filed at the return term of the writ, "*nunc pro tunc*." In attachment cases, the filing of the bond by the plaintiff is a necessary and indispensable prerequisite. The statute respecting attachments has always been considered one of *stricti juris*. The statute respecting proceedings against boats and vessels, is of the same nature. We are lead to the conclusion, that as the decisions of this court, concerning attachments, were known to the legislature, (the case of Stevenson & Hord vs. Robbins, having been made some ten years prior to the passage of the above supplementary act, concerning boats and vessels,) that they intended that the construction of the attachment law in regard to the first filing of bond, should be the rule to be applied to this statute concerning boats and vessels, and that the filing of the bond in this case, by the plaintiffs or some person for them, was an indispensable act to be first done before the writ could issue against the boat.

We think the court below therefore erred, in permitting the plaintiffs to file their bond at the return term of the writ, now for then, and consequently erred in overruling the motion to dismiss the suit.

CAMPBELL vs. LUTTRELL.

The judgment of the court below is therefore reversed, and this court orders the suit to be dismissed.

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CAMPBELL vs. LUTTRELL.

If a constable fails to return an execution within the time prescribed by law, he is liable: inability to execute it for "want of health," will not excuse him.

APPEAL FROM POLK CIRCUIT COURT.

Todd for appellant insists :

1. The execution was not returned within sixty days after it issued, and was in defendant's hands, and defendant is expressly bound. Rev. Statutes, title "Constable," p. 116, sec. 5, 8.
2. The constable was aware the appellant was assignee of the debt in execution and liable to lose it by delay. 15 Conn. Rep. 51.
3. No excuse of want of health is good, for the constable is bound to have deputies to do the duties, if unable himself. The law authorises deputies. Rev. Statutes, "Constable," p. 116, sec. 5, 8; 3 Alabama Rep. 28.
4. It is against public policy to admit such excuses.

Judge BIRCH delivered the opinion of the court.

All the facts deemed necessary to the understanding and decision of this case are, that the appellant having a judgment, before a justice of the peace, placed an execution in the hands of the appellee (who was constable,) on the 29th of August, 1843. The execution was returnable within sixty days, and was returned "not served for want of health" on the 1st of November following.

The appellant had judgment before the justice, under the notice and motion which was authorised by the 8th section of the statute then and yet in existence "respecting constables." Upon appeal to the circuit court, it was proven that the defendant was in bad health whilst the execution was in his hands, being confined to bed a portion of the time; and that about the time of the return of the execution, it was deemed hazardous for him to be out. It was further proven that during the time

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 REED, Guardian of TOLSON, vs. WILSON & GARNER.
 

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covered by the issuing and return of the execution, the defendant (in the execution) had no property in possession upon which it could have been levied. The circuit court gave judgment for the defendant, and the plaintiff has brought the case here by appeal.

We think the judgment should have been the other way. When a party is driven to the law, he is entitled to *all* the right it confers upon him. One of those rights, in this instance, was that the plaintiff should have his execution returned within sixty days. This was not done, and the ambiguous endorsement, and no less ambiguous testimony, that it was not done "for want of health," cannot be received as an excuse, especially by an officer for whom the law provides so facile a method of appointing deputies. Whether by reason of the debt having been assigned to the plaintiff in the execution or otherwise, he was an *actual* loser in consequence of the neglect of the constable, is not for us to enquire in the face of a legislative exposition of the rights and duties of the parties. The judgment of the circuit court must, therefore, be reversed and the cause remanded.

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### REED, GUARD'N OF TOLSON, vs. WILSON & GARNER.

1. A suit on behalf of a lunatic must be instituted in the name of the lunatic, and not in the name of the guardian.
2. In an action of replevin, "where the plaintiff fails to prosecute his suit with effect," the assessment of damage is imperative, and may be made by the court, if neither party requires a jury.

#### APPEAL FROM HOWARD CIRCUIT COURT.

#### CLARK for Appellant insists :

1. That in this State, the action of replevin can be brought by any person having the right of the possession of the property sued for, and that either a general or special property, coupled with the right of possession, is sufficient to maintain this action. See Rev. Code, Title Replevin, *Broadwater vs. Darn*, 10 Mo. Rep. 277, 1 Chitty's pl. 82, 3, 138, 187.

2. The guardian in this case was by law entitled to the possession of the estate of the lunatic, and he was bound, in the discharge of his duty, to take possession of and manage it for the benefit of the lunatic according to our statute on that subject. Rev. Code, Title Insane

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 REED, Guardian of TOLSON vs. WILSON & GARNER.
 

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Persons, secs. 13 & 14, p. 595. Having the charge and control of the person as well as the estate of the lunatic, the guardian had more than a naked right to the possession. He acquired by virtue of his trust a special vested interest in the estate, and after the appointment of the guardian and his qualification, the detention was against his right of possession, bared upon this special interest and the suit was consequently brought properly by the guardian. Story on Bailments, 109; 19th Wendell 306, 3rd John. cases, 53, 3 Watts & Sergt. 416, 2 Ark. Rep. 326.

3. The court erred in assessing the damages—this is like all other cases, the court we think, has no power to assess the damages against the consent of either party. 9 Mo. Rep. 163.

### LEONARD for Appellees insists :

1. The amendment of the plea and the refusal of the court to render judgment or for want of a plea, are matters within the discretion of the circuit court, and there is nothing in the record to show that the decision was improperly exercised, even if these matters are proper subjects for a writ of error.

2. By the express terms of the statute, if the plaintiff fail to prosecute his suit with effect and without delay, the court or jury may assess the value of the property and the damages for the use of it. Rev. Stat. '45, Replevin Sec. 8.

3. The action in behalf of a lunatic must be in the name of the lunatic and not in the name of the guardian or committee. Co. Little 135 6, 6 Bacon's Abr. "Idiots and Lunatics." G. Shelford on Lunatics, 395; Thorn vs. Corrad 2 Siderfin 124, Drury vs. Fitch; Hutton's Rep. 16, Fulcher vs. Griffin; Pohnam's Rep. 140, Coke vs. Darston; 1 Brown & Golb 197, Knipe vs. Palmer, 2 Wilson 130 Cox vs. Dawson, Noys Rep. 27, Lane & Gross vs. Shemerhorn; 1 Hill (N. Y.) 97, Long vs. Whidden 2 New-Hampshire Rep. 436; McKnight vs. Aiken, 3 Hill (S. C.) 337, Crane vs. Anderson 3 Dana R. 119. If the present were even the case of the guardianship of a minor, this action could not be sustained in the name of the guardian, Dearman vs. Dearman 5 Alabama Rep. 202, Sutherland vs. Goff, 5 Porter's Rep. 508, Fugna vs. Hunt, 1 Alabama Rep. 197, Barrett vs. Commonwealth, 4, J. J. Marshall 389, Barnett vs. Commonwealth, 5, J. J. Marshall 286, Longstreet vs. Tilton; 1 Cox N. J. Rep. 38.

### Judge BIRCH delivered the opinion of the court.

Reed as guardian of Tolson, a lunatic, brought an action of replevin against Wilson & Garner for the detention of slaves and other personal property. At the return term the defendants pleaded the general issue, entitling it "at the suit of Tolson, by her guardian," upon which the plaintiff took issue. At the trial term, the defendants had leave to amend their plea, by entitling "at the suit of Reed guardian of P. Tolson," corresponding with the declaration. The plaintiff having ineffectually objected to the amendment, thereupon moved for judgment against the defendants for want of plea which was overruled and the parties went to trial. It was properly proven that Miss Tolson had been declared a lunatic, that Reed was her guardian and had demanded the property in suit which was refused by the defendants. It is deemed unnecessary further to recapitulate the testimony, it being apparent from the record, that the issue in the court below was finally narrowed to the legal

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 McMILLEN vs. THE STATE OF MISSOURI.
 

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right of the guardian to institute a suit in his own name, instead of that of his ward. Upon this point, the current of general authorities seems unbroken and conclusive, and we do not perceive that the reasoning upon which they are predicated is impaired or affected by the provisions of our statute, "regulating the action of replevin" or the duties of the guardian as prescribed in the "act relative to insane persons." We perceive therefore, no error in the instructions of the circuit court, upon which the plaintiff took a non-suit; these instructions having simply asserted the legal conclusion, that the plaintiff could not recover the property of his ward in an action in his own name but that (*a con verse*,) such a suit must be instituted and prosecuted in the name of the lunatic, by the guardian.

Upon the other points in the case, as the bill of exceptions contains nothing upon which we can predicate an opinion adverse to the recovering, upon which the judge proceeded in the exercise of the discretion he was clothed with respecting the motion to amend the pleading and the antagonist one for judgment by default, the legal presumption arises that he used it legitimately and soundly; and the plaintiff having "failed to prosecute his suit with effect," the assessment of damages, &c. would seem, not only regular but imperative and surely *may* be done by the court, if either party *require* a jury.

Upon the whole record therefore, the judgment must be affirmed.

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### McMILLEN vs. THE STATE OF MISSOURI.

1. Where several persons are jointly indicted for murder, upon a separate trial of one, a witness may testify as to the unfriendly state of feelings at and before the time of committing the offence, between the deceased and those not upon trial for the purpose of proving malice and a general conspiracy by all.
2. Where the objection to evidence is irrelevancy to the issue, the supreme court cannot settle the point unless all the evidence in the cause is preserved in the bill of exceptions.
3. The question whether an accomplice may be a witness for others joined in the same indictment with himself provided he be not put upon his trial with the others discussed.
4. Upon a trial for murder the declarations of the deceased are not admissible in evidence unless they constitute a part of the *res gestae* or are made *in articulo mortis*.

## MCMILLEN vs. THE STATE OF MISSOURI.

## ERROR TO COOPER CIRCUIT COURT.

## LEONARD &amp; HAYDEN for plaintiff.

1. We object to the testimony of John Logsdon given in behalf of the State, that he knew there were unfriendly feelings existing between Jackson Logsdon and the other three defendants.

2. To the testimony of John Logsdon proving a first fight between himself and John McMillen, one of the defendants.

3. To the exclusion of testimony proposed to be given by the defendant, through John McMillen, that there were no unfriendly feelings on the part of the witness, (one of the defendants) to Jackson Logsdon.

4. To the exclusion of the testimony proposed to be given by the defendant, through Mrs. McMillen, that she heard Jackson Logsdon threaten to shoot John McMillen.

5. To the exclusion of the evidence proposed by the defendant to be given through John Prewitt of a transaction going to show that Jackson had a pistol for the purpose of, confirming defendants witnesses, to prove that he was armed with a pistol in the affray, and discrediting the State's witnesses who deny that fact.

6. To the court's refusal of the defendant's two last instructions, being the eighth and ninth.

7. To the court's refusing a new trial on account of the newly discovered evidence, and for the other reasons assigned in his motion therefor.

## ROBARDS, Attorney General, for the State.

The first point in the cause is, whether the court erred in admitting the evidence of John Logsdon, a witness, that there were unfriendly feelings existing between the deceased, Jackson Logsdon and the three defendants not upon their trial. This evidence was given as a circumstance to assist in establishing a previous conspiracy entered into by all the four McMillens, and for this purpose it was legal. But upon a failure to give sufficient evidence to prove a conspiracy, this was not before the jury in considering their verdict. This court will not reverse the judgment on account of the admission of the above evidence, because it is manifest to the court that it could have operated no injustice against the defendant. 12 Wendell 41, 3 Johnson's Rep. 532, 2 Caine's Rep. 90; 5 Mo. Rep. 532, 6 Mo. Rep. 301, 7 Mo. Rep. 419; 8 Mo. Rep. 227; 9 Mo. Rep. 166; 10 Mo. Rep. 65.

2. No specific objection was made in the circuit court to the admission of this evidence and this court will not decide upon it. 8 Mo. Rep. 131; 6 Mo. Rep. 186; 7 Mo. Rep. 316; 4 Mo. Rep. 540; 19 Wend. Rep. 562.

3. The court properly rejected the evidence proposed to be given by John McMillen, a witness, viz: "That he had no unfriendly feeling towards the deceased previous to his death," because it did not tend either directly or indirectly to prove or disprove any part of the issue or any material part of the cause.

4. As to the facts set forth in the affidavit of the defendant, upon the motion for a new trial, they are not admissible for two reasons:

*First*, They are hearsay declarations. Roscoe Crim. Ev. 20; 7 John. Rep. 95, 15 John. Rep. 230; 7 Humphrey Tenn. Rep. 543.

*Second*, If admissible at all, these facts are only cumulative and are no good grounds for granting a new trial. 12 Mo. Rep. 57.

## NAPTON J. delivered the opinion of the court.

Aaron McMillen and his three sons, John, James and Michael, were jointly indicted for the murder of Jackson Logsdon. They were tried



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separately. The appellant, Aaron McMillen, was found not guilty of murder as charged in the indictment, but guilty of manslaughter in the third degree, and sentenced to imprisonment in the penitentiary for three years.

All the testimony given on the trial is not preserved in the bill of exceptions, but enough is stated to show the important facts in the case. The tendency of the evidence on the part of the State, which came mainly from the brother of the deceased and a young man named Casey who was associated with the Logsdons, was to establish a preconcerted attack by the four McMillens upon Jackson Logsdon, when he was alone and without arms. It appeared from this testimony, that after the commencement of the affray, the two witnesses above mentioned came to the assistance of the deceased, and that in the rencountre which ensued Jackson Logsdon was killed, his skull being badly fractured and his body shot through with a pistol ball. These two witnesses were the only persons present at the killing; one of them, John Logsdon, the brother of Jackson having a loaded rifle which he brought with him, upon hearing the quarrel, and the other two without weapons. All the McMillens were armed, two with fire arms (a gun and a pistol) and the other two with clubs. The witness, John Logsdon, snapped his pistol at one of the McMillens, as they advanced towards the Logsdons, and before his brother Jackson was killed.

The defence rested almost entirely upon the evidence of the three McMillens, who were not upon trial; and the wife of the one who admitted himself to have shot the deceased. Their testimony tended to show that the Logsdons had sought the rencountre and that only two of their party were present at the commencement of the attack; and that these two were pursuing their usual vocations, the one having started on horseback on his way to carry the mail, and the other accompanying him on foot for the purpose of feeding some stock at a field cultivated by the family at some distance from the house. These two witnesses and co-defendants were attacked by the Logsdons, and according to their statements, Jackson Logsdon was armed with a pistol and his brother with a rifle. John McMillen shot Jackson Logsdon, after he, Jackson, had presented a pistol at his breast, and Casey, the friend of the Logsdons, broke the skull of the deceased by a blow of his gun aimed at one of the McMillens. There was no testimony apart from the statements of these witnesses, that Jackson Logsdon had any pistol or other weapon.

It is unnecessary to notice the evidence more minutely, as the only errors assigned, consist of the admission or exclusion of certain evi-

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dence offered on the trial. We have stated sufficient to show its general tendency on both sides.

1. John Logsdon the principal witness for the State, testified, that there were unfriendly feelings between the defendant, Aaron McMillen and his brother, Jackson Logsdon; and he further testified that there were unfriendly feelings between the other defendants and Jackson Logsdon, his brother. This evidence was objected to, but was admitted and an exception taken.

As the tendency and object of this evidence was to establish malice on the part of the defendant and a participation in this feeling by all the co-defendants, it is difficult to see any objection to its introduction. The point however, is not urged, and we will therefore pass to the second exception.

2. The witness, John Logsdon, previous to the close of the evidence on the part of the State, was recalled and stated that four or five days before the affray, he and John McMillen had a fist fight. This was objected to.

It will be observed that all the evidence is not preserved in the bill of exceptions. The only objection which could be urged to this testimony, would be its irrelevancy, but it is impossible for this court to see, from the record, whether this objection existed or not. Standing as it does in the bill of exceptions, isolated and disconnected with what preceded and succeeded it, its materiality is not very manifest. The fact testified to, may have been important, in two points of view, first, for the purpose of corroborating the testimony previously given, in relation to the state of feeling between these two families, and secondly, with a view to elucidate some other fact already testified to in the case, and not now appearing upon the bill of exceptions.

3. Upon the examination of John McMillen, one of the co-defendants, the defendant proposed to prove by this witness that he (the witness) had no bad feeling for Jackson Logsdon previous to the affray. This testimony was objected to, and the question was not allowed to be answered.

In this case, it will be seen that all the co-defendants, who were not upon trial, were permitted to testify without objection. This was so held in Garnett and others vs. the State (6 Mo. Rep. 1.) That decision was based upon a passage in Starkie. (2 Stark. 22) and the passage in Starkie, upon an observation of Lord Hall, "that the witness is never indicted, because that weakens and disparages his testimony, but *possibly* does not take away his testimony." The opinion of Starkie seems to be without authority and is indeed accompanied with a *quere* in his own



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notes. Professor Greenleaf also says: "it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put upon his trial at the same time with his companions in crime, he is also a competent witness in their favor." For this no authority is cited and in a previous passage, the same author has said; "In regard to defendants in criminal cases, if the State would call one of them as a witness against others in the same indictment, this can be done only, by discharging him from the record, as by the entry of a *nolle prosequi*, or by an order for his discharge or dismissal, where he has pleaded in abatement as to his own person and the plea is not answered; or by a verdict of acquittal where no evidence or not sufficient evidence is adduced against him." The general current of authorities, both in England and in this country, is unquestionably, that where several persons are jointly indicted, one is not a competent witness for the others, without first being acquitted or convicted, and it makes no difference whether they plead jointly or separately. Upon an examination of the subject, somewhat hastily, I have found no authority to the contrary. 1 Phil. Ev. Text 74; 5 Rex vs. Rouland; Ry & Moo, 401 (21 Eng. C. L. 471) 2 Dev. 420, 1 Yergee 431; 5 Esp. Ni. P. R. 140, Rex vs. Lafond. In New York where they have a statutory provision exactly like ours, authorizing a co-defendant, in every indictment for a felony, to sever from his accomplices and have a separate trial, it has been held, that the rules of evidence were not altered by that act. 29 Wend. 377.

No question was however made in this case, as to the general competency of the witness; the subject is alluded to merely to show the unfavorable and doubtful position that such a witness must occupy at best. The question propounded to John McMillen, was whether he, (the witness) entertained unfriendly feelings towards Jackson Logsdon, previous to the affray in which he was killed. The witness was the defendant, who, according to his own statement shot Jackson Logsdon. It is obvious that the question could only be answered in one way. He was not bound to criminate himself and an affirmative answer must have inevitably had that effect. The question was propounded by the counsel of his co-defendant, his accomplice in crime, if any was committed, what weight could such an answer be entitled to under such circumstances? We are aware that the worthlessness of the testimony, is not a sufficient reason for rejecting it, and that it is the province of the jury to decide upon the weight of testimony, but this circumstance among others, tends to show, that no purpose of advancing justice is to be subserved by the reversal of a judgment upon such a ground as this.

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The only plausible ground for the introduction of such evidence as this, is the fact that John Logsdon, the witness for the prosecution, had previously testified that there were unfriendly feelings between his brother and the McMillems generally, and the defendant had a right to contradict the witness, and the proposed testimony of John McMillen had that tendency. The bill of exceptions shows, that upon a cross examination of John Logsdon, in relation to this point, he stated that he was examined before the committing magistrate and there testified, that he did not know of any bad feelings on the part of the defendant towards Jackson Logsdon, and further that he did not then (upon the then trial) know of any, but that he did know of bad feelings on the part of his brother Jackson towards the defendant. This explanation would seem to show, that there was very little, if any thing, left in the testimony of Logsdon on the subject which the defendant could desire to contradict. He admits, that so far as the defendant was concerned, his opinion of the bad feeling, he supposed to be entertained by him towards his brother, was rather an inference from his knowledge of the ill will which he candidly admits his brother and probably himself entertained for the defendant. So far as the defendant's case was concerned, there was nothing in Jackson Logsdon's testimony which a negative response to the rejected question of his father's counsel, could possibly contradict, and the only additional object to be attained by such an answer, was the possible effect it might have had in disproving the conspiracy and malice so far as the co-defendants were concerned.

In addition to the exceeding worthlessness of such evidence, coming from such a quarter and under such circumstances, and in addition to the fact that the portion of John Logsdon's testimony at which this proposed evidence was aimed had been so materially modified as to leave no grounds for disputing it on the part of the defence; the jury have acquitted the defendant of murder and thereby negatived the charge of malice and premeditation which all this testimony was designed to establish or refute. To what purpose then shall this judgment be reversed, had an error been committed on this point? The testimony was offered on the point of malice. It was designed to affect that question directly or indirectly, and the verdict of the jury has negatived its existence, and is so far in favor of the defendant.

4. Upon the examination of Ruth McMillen, the wife of John McMillen, one of the co-defendants, the defendant proposed to prove by her, that she had heard Jackson Logsdon, recently, before the affray, threaten to shoot her husband. This testimony was rejected. As Jackson Logsdon was not a party to the prosecution, what he said is no more

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MARTIN vs. MARTIN, Adm'r. of MARTIN.

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than the hearsay of any other man, and was therefore upon general principles inadmissible. Had his declaration been *in articulo mortis* or a part of the *res gestae*, they would have come within the exceptions to the general rule. The bill of exceptions does not show *when* the declarations were made. *Recent'y* is a word of indefinite character.

5. The defendant called a witness named Prewitt, who testified, that he saw John and Jackson Logsdon together on their way to Mr. Berry's the father-in-law of John Logsdon, about the month of September 1847, and then proposed to prove, that about this time, John and Jackson Logsdon were at Marshall in Saline county; that John was there for the purpose of obtaining from the county court a habeas corpus to get possession of his child, then in possession of his wife, who had left him and gone to her fathers, Mr. Berry; that the court not convening, John and Jackson Logsdon returned towards Berry's, John declaring with an oath, that he knew how he could get his child; that witness and others then immediately mounted their horses for the purpose of resisting the taking of the child by force, and followed after them; that as they came up, a pistol was seen in John Logsdon's bosom, and as they attempted to pass Jackson Logsdon, the latter put his hand to his bosom, under his vest, as a man would in attempting to grasp his pistol and holding his hand there, declared if any one attempted to pass him, they were dead men. This evidence was objected to, and the court excluded it.

It is sufficient to say, that this evidence was totally irrelevant and had not the remotest tendency to elucidate any portion of the matter then before the jury.

Judge RYLAND concurring, the judgment of the circuit court is affirmed.

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MARTIN vs. MARTIN, ADM'R OF MARTIN.

1. A bill, which seeks to establish, against several persons, demands which are similar—based upon the same facts, and growing out of, and depending upon the same principles, is not multifarious.
2. An administrator cannot sue his co-administrator at law.
3. Where a father upon the marriage of his son, delivers to him a slave without any ex-

## MARTIN vs. MARTIN, Adm'r of MARTIN.

planation *at the time* of his intention whether it is a gift or a loan, the presumption of law is that it is an absolute gift: and where the property thus delivered, remains a considerable length of time in the possession of the son, it should require the clearest, most direct and uncontradictory evidence to rebut this presumption.

[This cause was argued, and submitted to the court, at the January term, 1849, and the following opinion of the court was delivered by judge Napton: at the same term, the appellant's counsel filed the annexed petition for a rehearing. Before the petition for a rehearing was heard, judges Scott and McBride, were superceded by judges Ryland and Birch. A rehearing was granted, and the first decision of the court was not fully sustained. The first and second points above, are decided by the original opinion delivered by judge Napton, and concurred in, by the last opinion. The third point is established by the last opinion delivered by judge Birch.—REPORTER.]

## APPEAL FROM CALLAWAY CIRCUIT COURT.

## STATEMENT OF THE CASE.

On the 25th day of September, 1846, Samuel Martin, administrator of the estate of Russell Martin, deceased, filed in the office of the clerk of the circuit court of the county of Callaway, his bill in chancery against William R. Martin, his co-administrator and others, defendants in said suit.

The bill charges, that about the year 1820, Russell Martin, the intestate, resided in the State of Kentucky, that he had a considerable family of children, male and female, and was possessed of a considerable number of negroes; that it was his custom, upon the marriage of any of his children, to loan to such children, a negro servant to assist them in their domestic affairs; that some of the children died before said Russell Martin, and the negroes in their possession were returned to him, and with their increase remained with him until his death; that on the death of Russell Martin, Samuel and Wm. R. Martin became his administrators and administered upon his estate; that W. R. Martin and John Martin, claimed to hold the negroes so loaned to them with their increase, as their own property, as a gift from said Russell Martin, and refuse to render up the same to the administrators, to be administered as the estate of said Russell Martin. Samuel R. Martin applies to the circuit judge, sitting in equity, to interpose the power of the court, to remove the impediments from the administration, and prays that all the heirs and distributees of Russell Martin may be made parties defendants to the bill, and answer upon oath of their knowledge or belief whether the said slaves, furnished to them or their ancestors, were a gift or a loan—and that the slaves in the possession of W. R. Martin and John Martin or any of the heirs and distributees, if found to belong to the estate of Russell Martin, be decreed to be delivered up to the administrators of Russell Martin, to be administered as the property of Russell Martin, dec'd. Knowledge and intentional fraud is charged against John T. and W. R. Martin. W. R. Martin then filed his demurrer to said bill; amongst various reasons—for improper joinder of parties, want of jurisdiction, multifariousness, ample and complete remedy at law.

John Martin also filed his demurrer to the said bill, for want of equity and improper joinder of parties.

The complainant joined in the demurrers. The court overruled the demurrer as to W. R. Martin, and sustained the demurrer as to John Martin.

W. R. Martin then filed his answer to said bill, portions of which he admits. He admits that he refused to administer himself, and objected to said complainant administering upon said Hannah and her children, the negroes in his possession, charged in said bill to belong to the estate of Russell Martin. He admits that the several children, except herself, took possession of the said several negroes, as mentioned in said bill, but denies that they were taken

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possession of as loans, but were taken possession of at the several times mentioned in said bill as gifts by the said Russell Martin to them, as he is informed and believes. He denies that the negroes that were returned to Russell Martin, after the death of his children, were returned as the property of Russell Martin, but for other reasons; that he received said Hannah Oct., 1826, then about 8 years of age, and raised and supported her and her children to the present time; that he has been in peaceable and undisturbed possession of said Hannah as his own property ever since, and of her said four children since they were born; that the said Russell Martin never did in his life time, after this respondent took possession of said Hannah, claim said Hannah or any of her children as his property, but, on the contrary, repeatedly told this respondent that he intended Hannah to be considered as a gift, and that he did not intend that said Hannah or any of her children should be taken from him; and this respondent further answering, expressly denies that he ever received or took possession of said Hannah as a loan, but took possession of her as a gift from said Russell Martin, and expressly avers, that said Russell Martin, at the time he delivered said Hannah to this respondent, made a gift of her to this respondent, and so expressed himself at the time and often afterwards, and as above stated, has never claimed her or any of her children since.

The complainant filed his replication to the answer of W. R. Martin.

Then follows the answer of Peggy Martin, the widow of Russell Martin, who was made a party to the bill. Among other things, she states that to his daughter Nancy Vaughan Magill, Russell Martin loaned a negro girl named Jinny. To his daughter Lucy Dudley Lawrence, said Russell Martin loaned a negro girl named Annie. To his daughter Fanny Vaughter, said Russell Martin loaned a negro girl named Margaret. To his son John Martin, said Russell Martin loaned a negro girl named Caroline. To his son W. R. Martin, said Russell Martin loaned a negro girl named Hannah, which said loans took place in the State of Kentucky. After the removal of Russell Martin to this State, he loaned his son Samuel Martin a negro girl named Sally. That she has often heard her husband say before and after the loans to said children, that he intended to loan to his said children the said negroes; that he had not given and never intended giving negroes to any of his children, until after his death, and she has no hesitation in saying that such was the intention of the said Russell Martin, and the understanding of all the children: that after the death of Nancy V. Magill, and after the said Jinny had remained with the husband of the said Nancy, several years, said Russell took back the said Jinny and held her and her increase until the time of his death, as his own property; and also after the death of Fanny Vaughter, said Russell Martin took back, and claimed, and held as his own property until his death, the negro girl Margaret and her increase: that soon after the death of Lucy Dudley Lawrence, James Lawrence, her husband, returned the negro girl Annie to Russell Martin, said Annie then being sick, and after the recovery of said Annie, Russell Martin sent back the said Annie, to attend to and take care of the children of said Lucy Dudley Lawrence, but as the property of said Russell Martin; and she further states that Woodford, one of the children of the negro girl Caroline, loaned by Russell Martin to his son John, was brought to Russell Martin when an infant, and raised by this respondent, as the property of the said Russell Martin; and the negro girl Sarah, another of the increase of the girl Caroline, was sold as stated in said bill to Richard Swan, the consent of Russell Martin being first obtained to said sale. This respondent states, that to the best of her recollection and belief, never at any time before the death of the said Russell Martin, did any of his children claim any of the negroes so loaned or their increase as the absolute property of any of said children. She makes these statements from her absolute knowledge of the intentions of the said Russell Martin, respecting said property before and during the time said negroes were so loaned by her late husband to his said children.

Then follows the answers of James Lawrence and wife, Richard Henry Vaughter, Thomas Lawrence, Wm. M. Lawrence, Peggy Lawrence, by her guardian Jas. Lawrence, Houff and wife, Redman and wife, disclaiming a gift of any of the negroes of Russell from their own knowledge and belief, or from informations derived from their ancestors, and claiming only as



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the heirs and distributees of Russell Martin. Replication filed to the above answers by complainant.

John T. Martin, then, by leave of the court, filed his answer to the complainant's bill, and for answer thereto, says, that at the time of filing said bill, he was in possession of said negroes as stated in said bill, and since the commencement of said suit, has delivered up said negroes to the administrator of the estate of Russell Martin, deceased, and disclaims all right except as distributee. And afterwards, on Tuesday the 18th day of April, 1848, the court having taken the cause under consideration, and being now fully advised, do order and decree that the said complainant, Samuel Martin and W. R. Martin, administrators of Russell Martin, proceed to inventory the negroes in their possession, specified in the bill of chancery of Samuel Martin, adm'r., &c., against W. R. Martin and others, and proceed to administer upon the negroes, yet unadministered, as belonging to the estate of Russell Martin, deceased; and that the said Samuel Martin and Wm. R. Martin, as administrators as aforesaid, take into their possession the slaves in the possession of Wm. R. Martin, mentioned in said bill, to wit: Hanna and her children, Samuel, Sanford, Buford and Anthony; and that the said defendant, Wm. R. Martin, is decreed and required to give up to the said Samuel Martin and Wm. R. Martin the said slaves, and that the said Samuel Martin and Wm. R. Martin proceed to inventory the said slaves, and administer the same as the property of Russell Martin, deceased; and it is further ordered and decreed by the court, that the complainant recover against the said defendant, W. R. Martin, his costs and charges in this suit expended, and that he have execution.

The defendant produced his motion to set the decree aside, which was ordered to be filed, and thereupon the court overruled the same.

The complainant read the bill, exhibits, and all the answers except W. R. Martin's whose answer was read by him, when the complainant introduced the following testimony:

Mrs. Eustin Craig stated, that some fifteen or sixteen years ago, she had a conversation with W. R. Martin in relation to disposition of slaves by his father, which took place at the house of witness, in the presence of Moore, (the assessor) and the husband of witness. W. R. Martin asked if Mr. Craig paid taxes on the negro the father of witness gave her at her marriage: witness replied in the affirmative: W. R. Martin said he thought the way his father done was the best: his father loaned a negro to a child and paid taxes on it: if the negro died it was father's loss.

Mrs. Snell stated, that she has been acquainted with W. R. Martin for 13 years; lives in the same neighborhood; husband of witness has been dead 12 years; heard a conversation between W. R. Martin and her husband relative to the negro girl that Mr. Magill had; W. R. Martin said his father did not give his children negroes, that he loaned them; at his father's death they would come back to his estate; can't remember how the conversation commenced; Mrs. Magill had lived in Missouri, and was then dead; witness is perfectly satisfied that W. R. Martin made the statement which took place some time before the death of her husband.

Samuel Martin, jr. stated, that he heard a conversation between his father, John T. Martin, and uncle, W. R. Martin, which took place about 4 years since, and before the death of his grandfather, R. Martin. Witness and his father were going along the road by the house of W. R. Martin with a wagon; W. R. Martin got in the wagon and rode some little distance, and said it was a good idea the way his father let his children have the negroes, for if he had given them, the children might have spent them; can't recollect the particulars, but W. R. Martin, said it was a mighty good plan, for some of the sons or sons in law might have spent them.

Complainant put the following question:

Did you hear your father say any thing about your grandfather owning Caroline before the death of Russell Martin? (Objected to by W. R. Martin.) Overruled and exceptions taken.

Witness then stated, that he had heard his father say that the negroes were grandfather's; that they had been loaned to him, and that they belonged to the old man.



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A. C. Hawkins, another witness, stated, that he was acquainted with Russell Martin and his family; lived in old man Martin's family in Kentucky a short time before he came to this county, and came out here with the old man, which was in 1826.

Witness was asked if he heard a consultation between Russell Martin and John T. or Magill, in relation to negroes, which was objected to; objection overruled, and W. R. Martin excepted.

Witness then said he heard a conversation between the old man Martin and Magill, sometime after the witness came to this county, and after the death of Mrs. Magill; Magill had a girl of old man Martin's in his possession when Magill started to Kentucky; he wanted to take the negro with him; old man Martin objected, because he said the negro was his. He said if Magill would leave his child with him, he would raise it, and at his, old man Martin's, death she should have an equal portion of his estate; but if he, Magill, would take the child, he should not take the negro; don't recollect of hearing Magill claim the negro; don't recollect that I ever heard the old man, in the presence of either of the other children, claim the negro. I have had conversation with all the children of Russell Martin, and always understood from all of them, that the negroes would be equally divided between them at the death of the old man.

Joseph Faber, another witness, stated, that he was acquainted with W. R. Martin. Witness had a conversation with W. R. Martin in relation to the negroes that came to him from the old man Martin, which took place several years before the death of his father. W. R. Martin told me they were loaned to all the children, and the old man paid the taxes on them. This conversation took place between this place and the forks of the road going to Mr. McKinney's. There were executions against John T. Martin, and witness wished to know why they were not levied on the negroes in John's possession. W. R. Martin said, the old man had only loaned the negroes to John T. Martin. He further said, the old man had not given any of the children the blacks; he had only loaned them.

Hugh Twicher, another witness, states that he had a conversation with W. R. Martin at his house; conversation related to John T. Martin's negroes. He said Capt Jamison had said five years possession would give John T. Martin a title to the slaves; something said about taxes. I was constable at the time, and had executions against John T. Martin, which I think gave rise to the conversation. John T. Martin had negroes in his possession. I never levied an execution on the negroes of John T. Martin. Witness was asked what John T. Martin had said to him about the negroes before the old man's death. Objected to by W. R. Martin; overruled and exceptions taken. John T. Martin told me he had some personal property, and some negroes too. He gave up the personal property afterwards. When I went there nothing was said about negroes, as plaintiff had directed me not to levy on negroes. I had executions in my hands all the time I was constable.

Upon cross examination, witness said he made the money upon all the executions against John T. Martin but one; that was returned not satisfied.

Matthew Scott, another witness, states, that he was acquainted with Russell Martin and his sons. I was at Russell Martin's, and conversation arose between Russell Martin and W. R. Martin in relation to the slaves in W. R. Martin's possession. W. R. Martin was not satisfied with the right to the negroes. The old man said, if you don't want to take care of the negroes and raise them, send them home. I don't recollect that W. R. Martin answered it; both seemed to be in a fret and hurt. This took place not very long before the old man's death, less than two years. W. R. Martin said he was not willing to feed and raise the negroes for the rest. The old man replied, if he was not willing, send them home.

Richard Swan, another witness, said, I bought a negro girl of John T. Martin, named Sarah, in the winter or spring of 1844; the old man Martin and John T. Martin both signed the bill of sale. I had several conversations on the subject with W. R. Martin; the last was about the time I was trading for the negro. I told W. R. I was afraid of the right of John T. to the negro. When we were on a trade, John T. said his right was good; so did W. R. Martin.

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I told W. R. Martin I had talked with certain counsel on the subject, and told him John T. held by peaceable possession; he said five years gave right, but the old man paying the taxes on the negroes, done away with or interrupted that possession, and that he advised me to have the old man's name to the bill of sale. W. R. Martin said, if that was the case, he would give in his negroes from that time himself, even if the old man did assess them. He said no more about the title. The reason I talked with W. R. was, I had been told by John T. several times, that he held the negroes by peaceable possession, and counsel having advised me, I don't know that W. R. Martin said he held his negroes by peaceable possession. W. R. Martin did not say that either he or John held by gift.

Here the complainant offered to prove that it was a matter of public notoriety in the neighborhood, that the negroes belonged to the old man Martin: objected to by defendant; objection overruled and exceptions taken.

Witness said, I heard that the old man claimed the negroes when I first moved into the neighborhood; that John T. Martin's negroes were not responsible for his debts, and that they all held the negroes alike. W. R. Martin moved into the neighborhood seven or eight years ago. It is a matter of public notoriety since his removal into the neighborhood.

Here complainant identified the tax books by the clerk of the county court, and offered to read them in evidence. Objected to by defendant; objection overruled, and exceptions taken.

Complainant proved by the tax books that from the year 1828 to the year 1842, Russell Martin gave in from 11 to 17 slaves, W. R. Martin from 2 to 3, Samuel Martin 1, and John T. none. The defendant, W. R. Martin, showed by the tax books, that from the year 1843 to the year 1845, Russell Martin assessed from 16 to 19 slaves, and W. R. Martin from 4 to 5, Samuel and John T. none; and also showed by said tax books, that in the year 1846, W. R. Martin assessed 9 slaves.

Complainant then introduced Gideon Gaines, who said, twelve or fifteen years ago, I had a conversation with W. R. Martin in relation to a father giving property to his children. W. R. Martin spoke of his father's giving him a girl, and said it was nothing but right that parents should do as they pleased with their own property during their life time. He said nothing about a loan. He did not say whether the girl was a gift or loan.

A. C. Hawkins said, the old man had a good many negroes when he came to this country, but don't know the number. Sam'l. Martin got a slave by his wife, (which was objected to, overruled and exceptions taken.) Said slave is dead. When John T. Martin came to this country, if he had any negroes they were Caroline and her children. He had no others.

Mrs. Elizabeth Swan, another witness said, I am the wife of Richard Swan, jr., and I was at the house of Russell Martin about five years ago, when the assessor came along, and heard a conversation between Russell Martin and W. R. Martin. The old man gave in his negroes and W. R., Samuel, and John T. Martins. W. R. Martin complained and objected, but the old man said, "Billy they are my negroes, and I will do as I please with them." I also heard a conversation between my father and W. R. Martin, in relation to the negroes about four years ago. W. R. Martin was angry and said his father would give in the negroes and he had also given them in. W. R. Martin was asked what he had to show for them? He said nothing but peaceable possession for a long number of years, and he would hold them in spite of the old man. My father said he could not upon that ground.

Upon cross examination witness said, he had the negroes in possession for a number of years, don't remember the length of time. W. R. Martin said, he had often talked to his father about them, but he contended they were his. I did not hear W. R. Martin say any thing about a gift in that conversation. He was angry because his father gave the negroes in and claimed them.

Richard Swan jr. said, I never heard a conversation at my house between old man Edmondson and W. R. Martin in relation to the negroes. I heard W. R. Martin and my father, close at father's house, have a conversation in relation to negroes. John T. Martin was owing father and he was talking about getting a transcript. W. R. Martin said that a piece of his land

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was in John's name and would be subject to the lien if the transcript was taken, but told father to levy on John T. Martin's negro Sarah, and sell her, that John T. would hold the negro on account of the possession in spite of his father; he W. R. Martin intended to hold his in that way. Complainant enquired of witness, was it generally understood in the neighborhood that said negroes were loaned to W. R. Martin? Objected to by W. R. Martin, objection overruled and exceptions taken.

Witness said it was the general opinion in the neighborhood, that the negroes belonged to old man Martin. In the conversation before related, W. R. Martin wished my father to levy on the negroes and said John T. Martin had a good right on account of peaceable possession. My father said he would not do it, for John had no right to the negroes. W. R. Martin had a negro woman named Winny who had two children, one about four years old, the other younger, a negro man Lewis that he sold a few years ago and the woman Hanna and her children.

Upon cross examination, W. R. Martin said he intended to hold the negroes in the same way that John held his.

Mrs. Nancy Swan said, I am acquainted with W. R. Martin, and heard a conversation between him and my husband. Can't say positively as to the time, but somewhere within four or five years back. My husband was about buying a negro (Sarah) of John T. Martin and did not like to take the right of John. W. R. Martin said, he would be in no danger in buying the negro, for five years peaceable possession gave a right to the negroes. My husband told him that Capt Jamison said, the old man's paying the taxes on the negroes interrupted he possession. W. R. Martin said, he would give in his own negroes, even if the old man died from that time.

Harvey Scott said, I was present when Mr. Swan was trying to buy the negro, Sarah. John and the old man Martin were present. W. R. Martin objected to the witness detailing the conversation as he was not present; objection overruled and exceptions taken. Swan told the old man that he, Swan, had found out that there was a difficulty about the title, and if he bought the girl, both he, the old man Martin and John must sign the bill of sale. The old man said they were his negroes, and he would make the title. John made no reply. It was Sarah.

W. R. Martin here offered to prove, that while John T. Martin was in possession of the negroes, he said they were his, and that the old man had given them to him. Objected to by complainant; objection sustained and exceptions taken.

McKinney was acquainted with Russell Martin and his children for some time. W. R. Martin had a woman and a boy, and children besides those that came from his father. John T. Martin had no negroes except those that he got from his father. The old man had several negroes besides those in the hands of his children when he came to this country.

Witness was questioned as to the public notoriety, in relation to the manner in which the children of Russell Martin held their slaves. Objected to by W. R. Martin; objections overruled and exceptions taken. Witness said the claim of Russell Martin to all the slaves, was of public notoriety. He, McKinney, further stated, that James Lawrence brought a negro girl to this country, and heard him say frequently that the negro did not belong to him, but was loaned to him by his father in law, Russell Martin. Lawrence spoke of this before Russell Martin came to Missouri.

Elijah Adams said, I lived in the neighborhood of old man Martin, Sam'l. and W. R. Martin from the spring of 1832 to the spring of 1841. It seemed to be the general understanding in the neighborhood, that the negroes in the possession of the children, were a loan from the old man. W. R. Martin objected to witness detailing the general understanding in the neighborhood. Objections overruled and exceptions taken.

Upon cross examination witness said, I am of the impression that I heard a majority of the neighbors speak of the rumor as above stated. I am under the impression that the whole neighborhood knew it. I have talked with a half dozen of the neighbors on the subject.

Isaac Tate, another witness said, I was acquainted with the old man Martin and his family. The old gentleman was living at the place where he died when I moved to the neighborhood.

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W. R. Martin has moved there since. He has been there four or five years. Previous to that time he lived six or eight miles from his father's. Complainant asked witness if it was generally understood in the neighborhood, to whom the negroes in the possession of Russell Martin's children belonged. Objected to by W. R. Martin; objection overruled and exceptions taken. I have heard the rumor spoken of by my neighbors. It seemed to be understood that the negroes in possession of Russell Martin's children, were loaned. It has been familiar to me as long as I have known the family, that the understanding related to all the negroes furnished the children by the old man; as I understood a negro girl was furnished each one of them, to be given up at the old man's death.

Calvin Tate said, I lived in the immediate neighborhood of Russell Martin about twelve years; proves general understanding in the neighborhood, that the negroes were loaned to the children. Objected to by W. R. Martin; objection overruled and exceptions taken.

Upon cross examination, witness said, I have heard a number of neighbors speak of it. I can give the name of A. Allen. It may have been eight or ten years since I heard him speak of it. I have no impression before. I heard a good many speak of it; had some conversation about it before John Martin became insolvent; thinks it was before embarrassment of John T. Martin.

Franklin Burt said, I have been in the neighborhood of Russell Martin about eleven or twelve years. It was a common report in the neighborhood that old man Martin had loaned his children negroes; objected to; (objection overruled and exceptions taken.) Upon cross examination witness said, I don't know but I have heard my neighbors speak of it. Before the death of the old man I heard Swan speak of it. I never heard it contradicted 'till a little while before the old man died. There was then some objections.

John Harrison proved general understanding in the neighborhood that negroes were loaned to the children of Russell Martin; objected to, overruled and exceptions taken.

George L. Smith said, from rumor before the old man's death, it was commonly understood in the neighborhood, that the negroes belonged to old man Martin. I have heard others say that they did not belong to the old man, but a majority that they did belong to him.

Here the complainant closed his case, and the defendant, W. R. Martin, introduced the following testimony:

R. B. Overton said, I have known the family of Russell Martin since 1811 or 1812. Came to Missouri in the fall of 1825. Samuel and W. R. Martin and myself married sisters. At one time Samuel Martin proposed to sell me a negro woman, say two or three years ago. He said it was one that his father had given him. We differed in regard to the price of the negro. There was nothing about a loan. He spoke of no other person having title to the negro. I was then in the negro trade and would have bought her if Samuel Martin had been willing to take what I considered was a fair price. I knew nothing about the old man lending his negroes. Most of the time from 1841, to 1845, I lived within three or four miles of Russell Martin and was intimate in his family and was frequently at his house. For a while in this county I lived in six or seven miles and part of the time ten or twelve miles; was at the old man Martin's frequently in Missouri, and he was frequently at mine. I never heard of any public rumor until about the time of J. T. Martin's failure, and never heard a rumor about the old man's loaning negroes to his children, 'till I came to Missouri. I have heard Russell Martin say, that he had taken Woodford, one of the children of Caroline, the woman of John T. Martin into possession, because he had paid money for John T. Martin, as an indemnity to him. He said he had paid debts both in this state and Kentucky for John T. Martin. The old man said to me he wished Samuel would sell the negro, she was nothing but trouble to his wife and pox take the negro (which was a common expression with him) she was no account nohow.

Upon cross examination by complainant, witness said it was after Sam'l. Martin had proposed to sell the negro to me, that the old man said he wished Samuel would sell her. When Samuel proposed selling the negro to me, he said nothing about the title. After the old man had spoken to me about Samuel's selling the negro, he reckoned if I bought the negro the old man

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would make a bill of sale, as he had never made him one yet. The old man was not present at either of the conversations with Samuel. The conversation took place a year or two before the old man died. It has been several years, since I had the conversation with the old man about the negro Woodford. Sam'l. Martin said his father had not made him a bill of sale, but he reckoned he would, and I came to the conclusion that Samuel would make one to me if we traded. The negro Woodford spoken of, is the son of Caroline, the girl that John T. Martin received of his father Russell Martin.

Edward Sallee said, I have known Russell Martin and his sons for near 16 years. I have lived about six miles from the old man's, and was tolerably intimate with the old man of late years. There was no general rumor in the neighborhood in relation to the old man's having loaned the negroes to the children, so far as I know, until 3 or 4 years back, about the time of John T. Martin's failure, there having been some talk about selling John's negroes.

Upon cross examination by complainant, witness stated, I have heard the rumor of late years in relation to the negroes being loaned to children, but not later than John T. Martin's embarrassment. I assessed the county twice; the last year was in 1837, the first in 1834. The old man gave in some negroes, but did not state, as I recollect, in whose possession or where they were.

Caleb Tinsley said, I have seen the negro Hanna frequently, when I first came to Missouri, at the old man Martin's house. The negro Hanna came up and told me how-dy. I enquired who she was, and the old man said she was Billy's Hanna. W. R. Martin married before he left Kentucky.

Martin A. Miller. I have known W. R. Martin since 1828; lived within one and half miles of him for ten years. He had negro Hanna in his possession all the time. I am acquainted with the family of Martin, and never heard the rumor that the negroes in the possession of the children were loaned to them by the old man 'till after the commencement of this suit. Hanna was 10 or 12 years old when I first knew her. I never knew of any one else except W. R. Martin exercising acts of ownership over Hanna. For the last 7 or 8 years, W. R. Martin has not lived nearer me than 8 or 9 miles; neither did the old man at any time. I heard of the embarrassment of John T. Martin; it was a matter of public notoriety.

Henry T. Wright said, I have known Russell Martin and his sons since 1817. W. R. Martin was married in 1826, in the fall of that year, and the old man moved to Missouri the same fall. Previous to his removal, he placed negro girl Hanna in W. R. Martin's possession. She was then quite small. She was placed in his possession but a short time after his marriage. Part of the time since, I have been in this State, and have lived 4 or 5 miles from W. R. Martin's, and the balance of the time 12 or 13. I have heard rumors that the old man loaned negroes to his children, but can't say how or when. I heard of John T. Martin's being embarrassed, and it is since then I heard the rumors. I am satisfied I never heard of it before. I never even heard that the negroes in possession of W. R. Martin were loaned to him 'till since this suit has been commenced. I never heard one of the family speak of it. I was frequently at the old man's; was very intimate with him; I always heard the old man speak of the negroes as Billy's Hanna, Samuel's Sally; I never heard him say he had loaned or given the negroes, but always spoke of them as the childrens' negroes. I knew negro Lewis of W. R. Martin in 1826. He was between 9 and 15 months old. I am the brother in law of W. R. Martin and Samuel Martin; they both married my sisters; I am friendly with both.

Upon cross examination, he said, Russell Martin and W. R. Martin, at one time, lived 7 or 8 miles apart; since then about half a mile.

John Jones said, I have been intimately acquainted with Russell Martin and his family for 25 years; lived 7 miles from Russell Martin's, from his removal to this State 'till his death, and was intimate with his family all the time. I don't know that I ever heard a rumor that Russell Martin had loaned his slaves to his children. I once heard Lawrence say that the old man had never made a title to the negroes he had. I never heard old man Martin say he had loaned the negro to W. R. Martin or others of his children.



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Here W. R. Martin introduced the inventory of slaves belonging to the estate of Russell Martin, deceased, as made out and sworn to by Samuel and W. R. Martin, and first identified it by the clerk of the Callaway county court. The names of the following negroes were found to be in said inventory: Randall, Samuel, Dudley, George, Madison, Charles, Woodford, Hannah, Stephen, Charlotte, Ann, Joseph and Andrew Jackson. Said inventory was dated the 19th of May, 1846. The foregoing are all the negroes in said inventory.

Henry T. Wright being again called, said, I cannot say positively when Lucy Dudley Lawrence died, but think she died before the negro girl. I was at the old man's after the death of Mrs. Lawrence, and saw the negro there. She had a bad cough. I asked the old man whose negro; he said the old lady had brought her home to doctor her. There was a negro man belonging to the estate of Russell Martin, named Samuel; not the son of Hanna; in fact, Samuel is about as old as Hanna. The negro W. R. Martin has in his possession, Hanna, nor none of her children, are mentioned in the inventory just read.

F. Smith said, I have been acquainted with Russell Martin and his sons about 15 years. For 6 or 7 years I resided in about a mile of W. R. Martin's; have been intimate with him all the time. I lived some 7 or 8 miles from W. R. Martin when the old man died, but was frequently at the old man Martin's. So far as I recollect, I never heard any general rumor, 'till about the time suit was brought, either in my neighborhood or in the neighborhood of the old man, and never heard Russell Martin make any claim to the negroes.

Ezra B. Sitton said, I have been acquainted with Russell Martin and his sons ever since they have been in the country, and was frequently at their houses. I never heard any thing about the rumor in relation to the negroes being loaned. I never heard it spoke of in any way. I lived about fifteen miles from Russell Martin. I knew the negroes of W. R. Martin, but don't recollect their names, except the boy Lewis and the girl Hanna. I never had a conversation with old man Martin about these negroes. I have heard him speak of John T. Martin's negroes in the time of John's embarrassment. I have been in the habit of mixing a great deal among the people of this county, and had claims in my hands for collection against John T. Martin.

Mrs. Lawrence, another witness, said, I have been acquainted with Russell Martin and his family ever since I can recollect. My mother and old lady Martin were sisters. I was married at Russell Martin's in Kentucky. The oldest daughter had a negro girl in her possession. I don't know how she received the negro. I know that W. R. Martin had a girl in his possession in Kentucky. I was intimate with the family, and lived at old man Martin's before I was married. The old man came to Missouri before I did. I have been here 12 or 15 years, in the neighborhood all the time, not exceeding 5 miles from the old man's, most of the time close to the old gentleman's. James Lawrence had possession of negro Anna; got possession of her in Kentucky, and brought her to Missouri. I was a great deal about Russell Martin's house, but never had a conversation with him about the slaves he had let his children have, nor never heard any.

Upon cross examination, said, I don't know that the negro Anna, after the death of Mrs. Lawrence, went back to Russell Martin's. Whenever I went to James Lawrence's I saw her there. I did not live more than 3 miles from James Lawrence. Before my husband's death, I heard James Lawrence speak of the negroes being loaned—never heard any other rumor 'till since the old man's death. I always heard W. R. Martin say the negroes were a gift.

Here W. R. Martin closed his case, and the complainant offered the following rebutting testimony.

J. B. Grant, clerk of the county court, was shown a paper signed by Samuel Martin, to wit: "In addition to the inventory made by Saml. Martin, and W. R. Martin, adm'rs. of the estate of Russell Martin, dec'd., there is in the possession of John T. Martin 5 negroes; in the possession of W. R. Martin, 5 negroes; in Sam'l. Martin's possession, one negro, all claimed as the property of Russell Martin, dec'd., also claimed by John T. Martin, and W. R. Martin, as their individual property, and therefore refuse to give them up. I therefore wish the direction



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of the Callaway county court, upon this matter.—N. B. There is also one negro in the possession of Richard Swan, Sr., for which John T. Martin, received the benefit.

SAM'L. MARTIN."

but not sworn to, and said I have no recollection of this paper being handed to the county court. Sam'l. Martin handed me the paper, and requested me to take care of it. I told him I would put it among the papers, which I did, but never marked it filed. I think this took place after the inventory was filed. Inventory of negroes in John T. Martin's possession, filed 7th of January, 1847.

Jas. McClanahan said, I was judge of the county court, in April, 1846, was shown the before recited paper, I have no recollection of Sam'l. Martin ever having presented this paper to the Court. I recollected of his speaking of slaves, and asking the county court if he could file an additional inventory, including W. R. Martin's slaves. I think we instructed him to file it. I think this took place after the filing of the inventory, and in August or September, 1846. He said his co-administrator refused to sign such a paper, and wished to know if he could do it. It was a verbal statement to the court.

Franklin Burt being again examined, said, I was one of the appraisers of the estate of Russell Martin, deceased. We appraised 16 slaves; was shown the writing before recited, said he wrote it, and about the time it bears date. The negro in Sam'l. Martin's possession, was not appraised at the time the rest were, Sam'l. Martin demanded of W. R. Martin and John T. Martin, the negroes in their possession, to be appraised, but they refused to give them up. Also spoke of appraisements which were filed in December, 1846, and January, 1847, of negroes.

Upon cross examination, witness said, at the time the negroes were demanded, W. R. Martin said he had got the girl when he first went to house keeping, and when she was about 8 years old, and had raised her and her children, and considered them as his. Complainant offered to read the recited paper signed by Sam'l. Martin which was objected to, sustained and exceptions taken, by complainant. Complainant offered to read the last mentioned appraisements signed by Samuel Martin; objected to, sustained and exceptions taken by complainant. Complainant offered to prove that Russell Martin had claimed the negroes in his life time, which claim was not in W. R. Martin's presence; objected to, sustained and exceptions taken by complainant.

The foregoing was all the testimony given by either or both of the parties. The defendant, W. R. Martin, then filed a motion to set aside the decree and grant him a new trial, which being overruled, he excepted and appealed.

### HAYDEN and SHEELY for appellants.

1. The court had no jurisdiction of this cause. It was properly within the jurisdiction of the county or probate court; that court having full and complete jurisdiction over probate business. See Digest 1845, art. 1, title Administration, sect. 12, 15, 16, 33, 44 and 45; art. 5, secs. 8 and 9; art. 2, secs. 1, 2, 3, 4, 9, 11, 12, 43 and 45; county courts, power and jurisdiction of, Digest 331, sect. 13.

2. In this cause illegal and improper testimony was received. Public rumor had nothing to do with the case. It was illegal and improper, and should not have been received. The rules of evidence being the same in equity as at law, and so as to the competency or incompetency of witnesses, and of other proofs in causes in the respective courts. 2nd. Story's Com. sec. 1527; 1 Atkins 453; Glynn vs. Bank of England, 2 Ver. 41.

3. Where a parent at the time a child commences housekeeping, sends with said child a negro, without declaring at the time that he loaned said negro to such child, the presumption of law is, that said negro was a gift to the child. Smith vs. Montgomery's adm'r.; 5 Monroe 502; 4 Bibb. 35; 3 Suttell 136; Bell vs. Strother; 3 McCord 207; Degraffield vs. Mitchell

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Ib. 506; Eddings vs. Whaley; 1 Rich. C. R. 310, 316; Bird vs. Ward; 4 McCord 229, 231; Brashear vs. Blassingham; 1 Nott and McCord 224; Moore adm'r. vs. Dawney &c.; 3 Henning and Munford, 133; Olds vs. Powell; 7 Ala. Rep. 655, (new series,) Carter's Ex'r. vs. Rutland, Haywood, 113; Parker and wife vs. Thomas, Ib. 451; Mulliken vs. Greer, 5 Mo. Rep. 489.

4. As the plaintiff has called upon the defendant to answer the bill of complaint, charging that the negroes were loaned, and not given to the defendant (the appellant) by his father, the denial of the allegations, so made by the complainant, is to be taken as true, unless by two witnesses, or by one witness, and strong corroborating circumstances, the same is proved to be false. 7 Cranch, 69; 3 Wheaton 520; 6 Wheaton 453; 5 Peters 99; 1 Washington's Cir. Chy. Rep. 230; Baldwin's cir. Chy. Rep. 404; Greene vs. Vardeman, 2 Black, R. 328.

5. In this case the answer of the co-defendants, admitting that their negroes received from their father, were received as loans, are no evidence that the negro of W. R. Martin, was not given to him by his father, unless a father cannot give to one child and loan to another; and even if a presumption could arise, that he would not so act, the fact of such lending to the co-defendants, cannot be proved by their answer or admissions in this case, as they are heirs, and interested as such in the estate sought to be enlarged by a decree for the complainant below, appellee here. 3 Conn. Rep. 319; Turner vs. Holeman; 5 Monroe 411; Thomas vs. Tucker; 2 Black 172; Morely vs. Armstrong; 3 Monroe 389; Adams vs. Hays; 2 Iredell 361 and 4; Old vs. Powell; 7 Ala. Rep. 656; Jones vs. Hardesty and others; 10 Gill and Johnson, 416.

6. The old man's statements and claim of the property, made in the absence of W. R. Martin, whilst the same was in possession of W. R. Martin from the time of his marriage, are no evidence of title or right in the old man to the negroes, nor was the assessment and payment of the taxes thereon, for the reason that no man is allowed to manufacture evidence for himself against another's rights. Green vs. Harris; 3 Iredell 210; Gilbert and wife vs. Lamberton; 1 English's Rep. 121.

7. In this case there is no evidence conducing to show that the negroes were loaned, except some loose admissions of W. R. Martin, made a number of years since, and to say the most of them, are in all cases most unsatisfactory evidence on account of the facility with which they may be fabricated and the impossibility of contradicting them. Besides the slightest mistake or failure of recollection, may totally alter the effect of the declaration, and in this case there are no legal corroborating circumstances. Bottsford vs. Bur; 2 J. C. R. 411; Stone vs. Ramsay; 4 Monroe 239; Adams vs. Hays; 2 Iredell 369; Linch vs. Linch; 10 ves. C. R. 518; Thomas &c. vs. Thomas; 2 J. J. Marshall 65; 1 Greenleaf, sec. 200, page 241; Moore vs. Smith; 14 Serg. and Ran. 393; Mullikin vs. Greer; 5 Mo. R. 489. If the court, however, shall consider such loose admissions as evidence, then they are bound to consider all the declarations of said William, though made at different times.

## LEONARD &amp; ANSELL for appellees.

*First.* In reference to the jurisdiction of equity in this case.

The object of the bill is to establish the title of the estate of Russell Martin, deceased, to five slaves claimed and held adversely to the estate of William R. Martin, one of the two administrators, under an alleged gift from his father, the intestate, and to compel the administrator to administer them as part of the estate, and the jurisdiction of the court may be supported upon either of the two following proofs or items:

1. Whenever there is a right, recognized by the law of the land, and the legal remedy is accidentally extinguished, equity will take jurisdiction and enforce and protect the right according to the exigency of the case. Here the right of the estate to the slaves in question, cannot be set up at law. A man acting in a representative capacity, cannot sue himself act-

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ing in his own right, nor can one joint administrator sue his companion at law. *Milford's Plead.* 160, 167; 1 *Story's Equity*, secs. 78, 81, 100, 679, 680; *Saunders heirs vs. Saunders Executors*, 2 *Littell Rep.* 315, (cited in 1 *Amer. Chan. Dig.* 437, sec. 14) 2 *Williams on Executors*, 689, 690.

2. The property of an intestate's estate, is subject to the trusts declared upon it by law, which are the judgment of the debts and distribution among the heirs, and the administrator is the trustee appointed by law to execute these trusts, and this, like all other trusts upon property, is subject to the jurisdiction of equity, whatever doubts may exist in relation to the source of the jurisdiction of English equity over executors and administrators, all these doubts are extinguished here by both constitutional and legislative enactments, expressly conferring it upon our courts of equity. *Adair vs. Shaw*, 1 *Sch. & Lef.* 262; 1 *Story's Equity*, secs. 532, 533, 534; *State Const.* Art 5, sec. 10, *Rev. Stat.* of '45, p. 330, sec. 6, clause 6; 2 *Story's Equity*, sec. 1328, 1329, 1330, 1333, 1335.

3. The jurisdiction of a court of equity, founded originally on the want of an adequate remedy at law, is not divested either of the subsequent assumption of jurisdiction by the law courts, or by their subsequent acquisition of it through express legislative enactments, unless the jurisdiction of equity is taken away, either by express words or the vesting of an exclusive jurisdiction over the matter in a different tribunal. 1 *Story's Equity*, sec. 63; *Kemp vs. Prior* 7 *Ver.* 248; *Mathews vs. Newby*, and *Howard vs. Howard*, 1 *Verne*, 133 & 134; *Varet vs. New-York Ins. Co.* 7 *Pargess Rep.* 567.

4. There is no pretence that the jurisdiction has been expressly taken away, and the jurisdiction conferred on the county courts over the estates of deceased persons, is not exclusive of the equity jurisdiction of the circuit court, over executors and administrators. *Rev. Stat.* 1845, Title "courts," secs. 6, 13, 14, 15; *Rev. Stat.* 1835, Title "courts," secs. 8, 15; *Rev. Stat.* 1825, Title "courts," secs. 4, 6; 1 *Territorial Laws*, 683, 684, secs. 3, 10; *Irwin vs. Henry*, 5 *Mo. Rep.* 470; *Berry vs. Robinson*, 9 *Mo. Rep.* 278; *Clark & Wife vs. Henry's Adm'r.* 9 *Mo. Rep.* 342.

5. If, however, it be admitted, that much of this equity jurisdiction has been conferred by our statute, exclusively upon our county courts, there is no ground for asserting that questions of title to property, set up by the estate against strangers, and much less when set up against one of two joint administrators, is a matter subjected to the exclusive jurisdiction of our county courts.

*Second.* In reference to the facts of the case.

1. The Proof clearly establishes, that the transaction under which the defendant, William R. Martin acquired the slaves in controversy, was a loan, and not a gift. The plan adopted by the father for the distribution of his slaves among his children, was to retain the title in himself and permit them to have the possession during his life, to be returned with their increase at his death into the common mass of his property, and the whole to be divided equally among all his children.

2. The bill charges the transactions with the children, to have been loans, and not gifts. The answer denies that they were loans and insists that they were all gifts, and declares that the father never did claim the slaves in the defendant's possession. On the hearing, the plaintiff proved that the father did claim these slaves, and then, to prove the defendant's knowledge of this claim, gave evidence (which was objected to) that the claim was a matter of notoriety in the neighborhood of the parties. The object of the proof was to falsify the answer, and to establish the defendant's knowledge of the father's claim; and proof of its notoriety in the neighborhood was competent evidence for that purpose. *Round vs. Gordon*, 8 *Mo. R.* 19; 2 *Story's Eq. sec.* 1528; 1 *Starkie*, 520 side paging; 11 *Serg. and Ran.* 373; 14 *Johns. R.* 215; 4 *Wend.* 96; 4 *Bibb.* 35; *Keese and West vs. Macey*; *Benoist vs. Darby*; 1st. part, 12 *Mo. Rep.* 196.

But if this proof be struck out of the case, the other evidence in the record is amply suffi-

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cient to establish the loan, the only contested fact in the record; and of course, for such an error, the decree cannot be reversed.

3. The proof offered by the defendant, that John Martin claimed the slaves that were put into his possession, as a gift, and not as a loan, is not legal evidence that such was the fact, and if admissible and now received with the proof, would not change the result as to the material facts of the case, and of course is no ground for reversing the decree. *Turner vs. Belden*, 9 Mo. Rep. 797; 4 Ala. Rep. *Oden vs. Stubblefield*, page 40, sec. 1; Supplement to State Digest page 706, sec. 1132.

*Third*, in reference to the pleadings.

1. The bill is not multifarious, *Whaley vs. Dawson*, 2 Sch. Lefr., 370, 371; *Campbell vs. Makay*, 1 Mylne & Craig, 306 (13 Cond. Eng. Can. Rep. 544) *Fellows vs. Fellows*, 4 Conn. 683; *Brinkerhoff vs. Brown*, 6 John. Chy. Rep. 139; *Story's Equi. Plead.* secs. 271, 278, 279, 283, 284, 285, 286, 530, 531, 532, 533, 534, 538, 539.

2. If it be, no advantage can now be taken of this defect by this defendant. The other defendant John Martin, appeared to the bill and put in his answer, stating that he had surrendered to the administrators the slaves in his possession, and renouncing all right to them except as heir of the estate, and does not himself object to the bill, or appeal from the decree that has been made. *Story's Equi. Plead.* sec. 283.

## Opinion by NAPTON, J.

The question, as to the multifariousness of this bill, would seem to be quite an abstract one in the present position of the case. The question was originally raised by a demurrer to the bill, filed by the present appellant, W. R. Mattin, and his co-defendant, John T. Martin. The demurrer of the latter party was sustained, but he subsequently filed an answer, disclaiming all title to the slaves in his possession, and giving them up to be administered as a portion of the estate of Russell Martin. The demurrer of the appellant was overruled. The other defendants, who were distributees or heirs of Russell Martin, in conjunction with the appellant and appellee, filed their answers, admitting the allegations of the bill, so far as the slaves in their possession was concerned. At the hearing, the whole case was narrowed down to a controversy between the appellant and the appellee. That controversy was investigated on its merits; a mass of testimony was introduced, and it is difficult to see any advantage which could result to the appellant from a reversal of the decree upon the ground of multifariousness, provided the other questions involved in the case should be determined against him. These suggestions are, however, made, rather as an apology for not going into a very critical examination of the authorities which have been referred to upon this subject, and not with a view to leave the point undecided. I believe the objection to be untenable. Passing by the question of jurisdiction, which will be presently considered, it will be seen that this bill has a common purpose in view, based upon a single and connected proposition. All the defendants stand in precisely the

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same predicament. They are all heirs of Russell Martin, and as such only claim a title to the slaves in their respective possession, by gift from the common ancestor and independent of their rights as distributees. If the title of one is good, the title of all is good; if one fails, all must fail. This is the assertion of the bill. The charge of the bill, is that Russell Martin, the ancestor, put into the possession of each of his children a slave, as a loan, and with the express understanding that the slaves were to be returned at his death, and they and their issue divided equally among his children. The whole object of the bill is to have this title, asserted to be in the heirs of R. Martin, ascertained and protected. The bill is against several persons, but the demands against each are similar, based upon the same facts, and growing out of and depending upon the same principles. It is true, that one of the defendants, W. R. Martin, occupies the position of co-administrator as well as a claimant in his own right; but it is in the latter character only that he claims any title to the slaves in his possession. Whatever effect the appellant's position, as administrator, may have in giving jurisdiction to the court, it is certainly only his antagonistic position to the estate that he is called upon to defend. Such is also the position of the other defendants. Why compel the personal representative to bring as many suits as there are heirs, when the whole matter can be as well and better settled in one suit? If the claims of the several defendants were derived from different sources, or depended upon different principles, and had no necessary connection with each other, so that the bill might fail as to one and be sustained as to another, I can see the inconvenience and impropriety of commingling such disconnected demands. But this is not so, and I therefore conclude that the question of multifariousness should not prevail.

I have no doubt of the jurisdiction of a court of equity in cases like the present. Where property alleged to belong to a decedent's estate, is in the possession of a third person, setting up an adverse claim, can there be any doubt that the personal representative of the decedent could maintain trover, or replevin, or detinue? Those sections of the administration act, which have been thought to provide a remedy in the county court in such cases, would not, upon any construction, oust the circuit court of its common law jurisdiction. The 9th section of the 2d article of the act provides for a case, where any person "conceals or embezzles" goods of the deceased. These terms would seem to imply fraud, but if the administrator preferred to waive the fraud and bring his action of trover, could a demurrer to the declaration be sus-



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tained on the ground of an exclusive jurisdiction in the county court? The cases which must have been contemplated by the 9th and preceding sections, are probably such where the title of the estate is beyond dispute. Very summary proceedings are authorized; a citation and examination on oath are permitted. Where a serious dispute was anticipated about title, a prudent administrator would scarcely venture on this extraordinary remedy. The action at law is plain, and his authority to bring it is beyond dispute. The 21st section of the same article expressly requires the administrator to commence and prosecute all actions which may be necessary in the course of his administration.

But the defendant, W. R. Martin, was a co-administrator with the complainant, and a suit at law could not have been maintained. The administrator could not sue himself, nor could one administrator sue his companion at law. If it be said, that the act concerning administration, has provided a mode of removing an administrator in cases of this character, and that by pursuing this mode, the defendant might have been sued at law, the necessity of such circuitous proceedings only more clearly brings the case within the jurisdiction of the chancellor. The remedy prescribed in the administration law, if any be admitted to exist, is not of that clear, ample and complete character, which ought to divest a jurisdiction already existing in another tribunal; plain, adequate and satisfactory. To proceed against the administrator for unfitness must also, to some extent, involve a consideration of the very same questions of title, which have ultimately to be decided in the subsequent proceedings. The law does not encourage circuitry of action. When a controversy can be settled in one suit, it is not good policy to require two.

Upon the facts of this case, I shall not dwell. To show where the weight of testimony is, would be to recapitulate all the evidence, which is voluminous, and may be found in the statement. I shall advert to one or two circumstances only, as satisfactory to my mind in favor of the decree.

It cannot be denied, that the testimony which ought to establish such an arrangement as is charged and sought to be enforced in this bill, should be of the most unequivocal and satisfactory character. Such plans are usually resorted to, with a view to protect property from creditors. They are seldom made in good faith, and where there is no want of good faith, they are still unequal and unjust in their operations, and tend to produce dissatisfaction and dissension. Courts of equity cannot view such dispositions of property in a favorable light; every presumption of law and of fact is against their existence; yet where they



are clearly proved, the right of the parties to dispose of their property according to their own caprices, is indisputable, and the contract proved must be enforced, however absurd or unjust.

Entertaining these views, in relation to the policy and propriety of such dispositions of property as is claimed to have been made by Russell Martin among his children. I have scrutinized the testimony with no unfavorable propositions against the defendant's rights. But there is a mass of testimony from witnesses who stand unimpeached, and whose opportunity of knowing the facts must have been great, all tending to establish the fact that Russell Martin placed with each of his children, upon their marriage, a female slave, *as a loan*, and with a distinct understanding on the part of the children, that the slave and her increase should be returned at his death into the mass of his estate, to be again distributed under the law. It is a fact, worthy of some consideration, that all the children in this case, except the defendant, admit this disposition, and have returned their respective shares of slaves. In relation to some of these heirs, it was their interest to maintain such an understanding, and their testimony to its existence, may therefore be entitled to but little influence. But this was not the case in relation to one or two of the others, who, in addition to the present defendant, were losers by the establishment of the title of Russell Martin's representatives, and their admissions tend to corroborate very strongly the assertions of the interested parties.

The admissions of the defendant, W. R. Martin, made during a long series of years, repeated to various witnesses upon various occasions, are certainly very convincing proof to establish the truth of the allegations of the bill. These admissions, however, are not alone, and unsupported by acts, but they were corroborated by acts of ownership asserted by the father, under circumstances calculated to leave but little doubt as to the real understanding of all the parties to the transaction. Russell Martin, the father, continued to pay the taxes of the slaves put in the possession of his children, and upon the slaves now claimed by the defendant, for a long series of years. W. R. Martin, the defendant, was heard upon several occasions to speak of the transaction as a loan, and to laud the justice and propriety of the arrangement, by which, as he then supposed, the sons and sons in law of his father would be prevented from dissipating the property advanced to them. In the course of ten or fifteen years, after the defendant had received the female slave, now claimed by him, from his father, he began to perceive the injustice and impolicy of his father's project. He then set about

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asserting title, but his course on these occasions, is one of the most convincing proofs to establish the title of his father. He never asserted that the slave in his possession had been given to him, but he commenced building up a title on long and peaceable possession. Having conceived a notion that five years peaceable possession gave title, he based his rights upon that doctrine. He never pretended that his father had given him the slave, but that his long and uninterrupted possession of her would, in the eye of the law, and as he had been advised, constitute a title for him. Is not this assertion, coupled with his former assertions, acquiescing in the original term of a loan and the repeated practical assertions of title on the part of the father, by paying taxes on the slave, sufficient to make a strong case against the defendant?

The testimony in relation to the public rumor, I have not noticed, because I think it was inadmissible, and there is ample testimony without it; nor is there any counter evidence of any note. Nearly all the testimony on the defendant's behalf is of a negative character. Numerous witnesses are introduced to prove that they had not heard any public rumor. That Russell Martin's slave had been loaned to his children, such negative testimony is entitled to but little weight, when opposed to positive testimony to the contrary, of unimpeached and disinterested witnesses.

The declarations of Russell Martin, the father, in the presence of the defendant, and uncontradicted by him, were also in evidence, and entitled to weight in aiming at the facts.

I consider, then, the repeated admissions of the defendant, and his subsequent assertion of title upon a supposed acquisition of one by long possession; the payment of taxes by the father, and his unequivocal declarations that the slaves were his, made in the presence of the defendant, and acquiesced in, although with evident dissatisfaction by the son; the acknowledgment of all the other children and sons in law of the father, Russell Martin, that the slaves held by them were loans, as altogether forming a mass of testimony in favor of the allegations of the bill, which I am not at liberty to disregard. Mere presumptions, however strong, cannot outweigh a mass of unimpeached positive testimony.

#### PETITION FOR A RE-HEARING.

*To the Honorable the Supreme Court of the State of Missouri:*

Your petitioner, W. R. Martin, by his solicitor in the above entitled cause, most respectfully solicits the court to grant unto him a re-hearing

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in said cause ; and in presenting this petition, his solicitor begs leave to premise, that he feels it his duty to your petitioner to do so. After having carefully perused the decision of the court, as well as the evidence in the cause, upon which the same is founded, he would state, that he feels no disposition whatever to question the correctness of the decision of this court, so far as the jurisdiction of the chancellor, as exercised by the circuit court in taking cognizance, &c., of the cause is concerned ; but that he feels conscious if the court in reconsidering the cause, will discard and disregard all that mass of illegal and irrelevant testimony which has found its way into the cause by an oversight of the court below, upon the trial there, it is impossible, your petitioner humbly conceives, to find remaining in the record evidence applicable to the case in equity to sustain the decision.

The undersigned, as solicitor aforesaid, would respectfully insist, that the court, in deciding the cause, by all the rules of evidence, (as well at law as in equity) are bound to disregard: 1st. All that testimony given in the cause with reference to the public rumor, respecting loans of negroes to his children, by the deceased in his life time, at the time of their marriage respectively ; and I understand this evidence is disregarded as irrelevant and illegal by the court in the decision rendered.

2nd. That the court is bound to discard the evidence with respect to all that the intestate said, as well as any act he did, whether in the assessment of the negroes in controversy for taxation, or in the payment of the taxes on the property under such assessments, under any claim or pretended claim of right thereto, whilst the same was in the possession of the said William R. Martin, as shown by the proof. Your petitioner respectfully states, that the law knows no distinction as existing in favor of the right of a father over a stranger, who is out of possession of property, which is in the possession of the son, claiming and exercising acts of ownership over it as his own, to assert that he is the owner of it in the absence of the son, or by paying taxes on it, so as thereby to create in himself a right, or evidence of right, to the property. No such distinction is or can exist in law, and surely no one will contend that A, can establish his right to property in the possession of B., who is exercising acts of ownership over it as his own, by representing to others, in the absence of B., that the property is his, and not the property of B., or by assessing and paying the taxes on the property thus in possession of B. If such were the law of this land, men of enterprize, with little labor and little money, in

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a short time could amass very handsome estates. If such evidence cannot be concocted by a stranger, nor by a father, so as to establish right to property in possession of a son, then, all such as is found in the record, the court is bound to close its eyes upon. It is not there in contemplation of law, and cannot be seen and will not be seen by this court. Then this drossy mass, being out of the case, I beg leave of your Honors to permit me to apply the pruning knife to all and every thing that is stated in the answers of the co-defendants in the cause, as well as every thing they may have stated in part, as well as the statements of others in derogation of the rights of my client, for the following reasons. As to the co-defendants, they are all interested, being heirs of the deceased, and would not be competent witnesses if sworn, and their answers as co-defendants cannot be read against the appellant. The statements of other persons, not on oath, are inadmissible. The record being thus cleansed, permit me to call the attention of the court to that which has a legal place in the record, as evidence, as well against as for my client. And, first, as to the evidence against him and in favor of the complainant. It consists alone in the evidence of the supposed statements of my client, who is but one witness in law, made *not* upon oath, years ago, in alleged casual conversations, in the presence of some old woman and two or three other persons, respecting his right to the negroes in controversy. I here beg the indulgence of the court, to permit me to call the attention of the court to the testimony of these few witnesses, by referring to the same at the pages in the record where the same can be readily seen by the court, and by giving an extract therefrom in this petition. See the testimony of Mrs. Craig. She testifies that some 15 or 16 years ago, she had a conversation with appellant, at the house of witness, in the presence of Moore and her husband, and appellant asked her if Mr. Craig, (her husband) paid taxes on the negroes which were given her at her marriage by her father: She replied in the affirmative, and to which respondent replied, that he thought the way his father did was the best, that his father loaned a negro to a child (not saying to him) and paid taxes on it, and if the negro died it was the father's loss.

Upon the cross examination of the witness, she could not recollect the year, but it was the year Moore assessed the county.

Mrs. Snell testified that her husband has been dead twelve years, and that in his life time, long before his death, she heard appellant tell her husband that his father did not give his children negroes, that he loaned them, and that at his death they would come back to the estate. She

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states, that she does not know how the conversation came up, but it was in a conversation respecting the taking back of the negro which the intestate had given or loaned to Mrs. McGill, then deceased. Witness, upon cross examination states, that it has been so long since the conversation, that she can't remember much about it. It will be evident to the court, in reading the deposition, that appellant was making a plausible excuse for his father, under the circumstances, for taking from the husband, Mr. McGill, the negro, after the death of his wife, who left an infant whom the father was about to remove with the negro to Kentucky.

Samuel Martin jr., states that he and his father, John T. Martin, an insolvent, were going along in the road in a wagon, and that the appellant got into it and rode a little distance, and said it was a good idea, the way his father had let the children have the negroes, for if he had given them, the children might have spent them. He states that he can't recollect the particulars, but he said it was a mighty good plan, for some of the sons or sons-in-law, who might have spent them. That no one but him and his father were present at this conversation.

See Hawkin's testimony. By reading this testimony, the court will see, that a difficulty had arisen some twelve or fifteen years since, and a noise was made respecting the conduct of the old man Martin having taken away the negro he had given McGill's wife, who had died with her first child, and hence the noise and rumor about his having loaned instead of giving his negroes to his children; and hence the casual conversations, indistinctly recollected, spoken of and referred to by Mrs. Craig and Snell, in which the appellant was solving over the conduct of his father, so well calculated to make a noise in the neighborhood.

Tincher's evidence. He states that he had a conversation with Wm. R. Martin at his house, relative to John T. Martin's negroes. That he witness, had an execution against John T's. property, which gave rise to the conversation. That in this conversation about John T's. negroes, he said Capt. Jamison had said five years possession would give John T. title to his negroes.

Matthew Scott states, that he was at the house of Russell Martin, father of W. R., not a great while before his death, less than two years before that time, and that he heard a conversation between them of an angry nature, about the negroes of William; so much so that the witness tried not to hear it; that Wm. R. was not satisfied with the right to the negroes; that both Wm. and the old man seemed to be in a pet about it, and the old man told Wm. R. that "if you don't want to take care of and raise the negroes, send them home." That Wm. R. said he was



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not willing to feed and raise the negroes for the rest, and the old man replied as above.

This conversation was about seventeen years after the negro girl came to the possession of William.

Richard Swan testifies, that he bought a negro girl of John T. Martin, in the winter or spring of 1844. That the old man and John T. both signed the bill of sale for her. He states that he had several conversations with William on the subject of the title of John T. Martin to his negroes (not about William's negroes.) The last conversation was had about the time the witness was trading with John T. for the said negro. Witness told Wm. R. in this conversation, that he, witness, was afraid of the right of John T. to the negro, that John had told witness, when they were on a trade for the negro, that his, John's right, was good, and that Wm. R. (appellant) also told witness so. Witness, in this conversation, told Wm. R. that he, witness, (not William) had talked with certain counsel on the subject, and told him that John T. held (not William) by peaceable possession. He said that five years gave right, but that the old man's paying taxes on the negroes, done away with or interrupted that possession, and that he, (viz. the said counsel and not William) advised him, the witness, to have the old man's name to the bill of sale for the negro he was trading with John T. for. To what the witness Swan, thus told William, the appellant, as to this opinion and advice of this counsel, he William thus replied: "That if that was the case, he, William, would give in his negroes (that is assess them) from that time himself, even if the old man did assess them." And he further states, that he don't know that Wm. R. said, that he, Wm. R., held his negroes by peaceable possession. Witness further stated, that, William stated, that he did not think the witness would be in any danger if he took the negro without the consent of the old man, (which witness had then stated to William that he would) but that as the witness was giving a fair price for the negro, he would get the old man's name. Witness further states, that Wm. R. always told him, that he considered the right of John T. to the negro girl good, and recommended the levying of an execution upon her, and it was then that the witness told Wm. R. of the opinion, &c. of said counsel. Witness further states that the old man did join John in the bill of sale for the negro, and that he paid the price to John, except what was owing from John to him, as a debt, which was deducted, and that all the price so paid to John, was applied in payment of John's debts.

Complainant next offered and read the books of the assessors of Cal-



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laway, which show the number but not the names of the negroes assessed by the old man or William.

Elizabeth Swan, daughter of the witness, Richard Swan, in stating her recollection of what passed between the old man and Wm. R., says, that she was at the house of the old man about five years ago, and Wm. R. was there, and the assessor came there, and she heard a conversation between the old man and William. The old man gave in his negroes and William R. objected to it and complained, but the old man said, "Billy, they are my negroes, and I will do as I please with them." Witness also heard a conversation between her father and William, in relation to the negroes, about four years ago, and that William was angry and complained of his father giving in his negroes, and stated that he had also given them in. Her father asked Wm. R. what he had to show for them, (the negroes) he replied, nothing but peaceable possession for a long number of years, and that he would hold them in spite of the old man. Witness, on cross examination, stated, that Wm. R. was very angry in both conversations. She says that she did not hear Wm. R. say any thing about a gift, but contended they were his negroes.

Here the court will remark, that William, in this as well as the other conversations between him and his father, claimed the negroes, objected to their being assessed by the father, was angry, in a pet, and also assessed them himself, and paid taxes on them, yielding no assent to or acquiescence in the claim of the father, but on the contrary, in his father's own house became so angry as to make unpleasant and disagreeable their conversations to one or more present at the time. It is true, that when Swan asked him what he had to show, as his title to the negroes, he responded thereto, "nothing but a long and peaceable possession," and which possession was acquired in such a way as all our courts in sister states as well as this, I believe, have decided to be legal evidence of a gift. He could have responded nothing else, as a citizen, unlearned in the law as he is.

The testimony above given, if the court please, is all the evidence having the slightest bearing, to disprove the right of William to the negroes, if it be true that the old man could not manufacture, by his own acts and sayings, in the absence of William, evidence for himself. And I defy any more to be found in the record, in favor of complainant.

I will now, by the indulgence of the court, proceed to contrast the evidence of the defendant with that of the plaintiff in the manner above pursued.

1st. There is the answer of the defendant, sworn to by him. He

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states that he was married about the 1st of October, 1826, in Kentucky, where his father then lived. That he went to and lived apart from his father a few days after his marriage, when he received from his father, Hannah, who was then only about 7 or 8 years old. That his father gave her to him. That he received her as a gift, and not as a loan. That she has had 4 children. That he has raised and had the possession and services, &c., as his own, down to the present time. And that his father repeatedly told him that he intended Hannah as a gift; and that he did not intend that she or any of her children should be taken from him. He also states expressly, that at the time his father delivered Hannah to him, he gave her to him and so expressed himself at the time. This is the substance of the answer.

Then what are the facts and circumstances to corroborate the answer. They are the following.

1st. There is no evidence showing that at the time the old man delivered the negro to William, there was any thing said by him or done by him, so qualifying the transaction, as to rebut the presumption of law in favor of its being a gift, arising from the relation of the parties, the time of the delivery and the other circumstances of the case. See the following authorities. 5 Monroe Rep. 502, 503; 4 Bibb. 35; 3 Littell 136; 3rd. McCord 207; Bell vs. Strawther, ib 506; Degraffield vs. Mitchell; 1 Richardson's South Carolina Rep. Edding vs. Whaley.

2nd. The negro was only 7 or 8 years old at the time of the delivery and the old man left her in possession of the son, in Kentucky and came to Missouri, without any evidence of any intent on the part of William to come here, and no arrangement, or guard whatever, by any step, writing or otherwise, common with men of the most ordinary prudence, to protect or secure the negro to himself, against the improvidence of a son, just named, and about to enter upon the business of life for himself, fearing no claim of the creditors of the son, &c. And not this alone, he permits the son to continue this possession peaceably, claiming her and her children as his own, for at least 18 or 20 years, before any denial of the right of the son, and then he sets up a claim, by paying taxes on her against the son's consent, who, in the father's house claims the negroes, quarrels with him, even there, expressly objecting to the acts of the father in assessing or paying taxes, and not one word or threat from the father, that he would compel the son, by suit, or otherwise, to surrender the property. And this adverse claim of the same, expressly made to the father, some 3 or 4 years before his death. I will here remark, though I hold the matter out of the case, that the payment of taxes by

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a father for a son, is nothing but natural, and in law or in reason would only create a presumption of a gift to that amount.

3rd. Overton proves that he heard the old man Martin say he had taken a negro, Woodford, one of the children of the woman he had given to John T. Martin, as an indemnity to him for money he had paid for John, both in Kentucky and in Missouri.

If the negro had belonged to the old man and not to John, he would not have taken him on that account. This witness further testifies that he heard the old man express a wish that his son Samuel would sell a negro which he had received from the old man, saying that she was nothing but a pest to the wife of Samuel, and this was after the witness had been talking about buying the negro of Samuel, and of which the old man was apprised. He also proves the continued possession of the negro and her children, by William, and his claim of ownership of them from the beginning. He states that Saml. Martin, speaking of the negro he was about to sell witness, spoke of her as one his father had given him, and said nothing about her being loaned to him. Witness proves also, that Saml. Martin, Wm. R. and himself married sisters. That they were all intimate, and he never heard a rumor about the old man loaning negroes until about the time of the embarrassment of John T.

Caleb Tinsley, states, that he, on one occasion, was at the house of old Martin in Missouri, and saw the negro Hannah there. She came up to him and spoke to him in the presence of the old man. He asked him who she was, and the old man replied, that she was "Billy's Hannah."

This is positive evidence that the negro was the negro of William, for if he had owned her, the answer, would have been, "she is my girl, or negro Hannah."

Henry T. Wright, states, that he has known the old man and his sons since the year 1817. That Wm. R. was married in 1826. That the old man moved to Missouri the same fall. That previous to his removal, he placed Hannah, who was a small girl, in the possession of Wm. R. He proves the continued possession of her and of the children which she had, some 4 or 5 in number. That Hannah was placed in Wm. R's. possession a short time after his marriage. That Wm. R. did not move to Missouri 'till the next fall after the father moved. That he heard a rumor for the first time, of the old man loaning negroes to his children, at the time of the embarrassment of John T. That he never heard a rumor that William's Hannah was loaned to him until since the commencement of this suit. Never even heard one of the family speak of it, though intimate.

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He states that he always heard the old man speak of the negro as Billy's Hannah." He never heard the old man speak of having given or loaned the negroes, but always of them as the childrens negroes.

Here again is positive evidence of the old man that the negro was William's.

There is an inventory of the estate of the dec'd., dated on the 19th of May, 1846, made out and sworn to by the complainant and defendants as adm'rs. of the estate of the old man, in which it appears that no one of the negroes mentioned is of those in controversy. Here is evidence of a strongly negative character, furnished under the oath of the plaintiff himself, who then knew, as well as now, the negroes of his father's estate, and he swears in that document, as does also the defendant, William R., that the negroes there inventoried, are all the negroes of the intestate. The law required him to make a full and complete inventory of the estate of the deceased, under his oath. Why did he not embrace within the inventory these negroes which he now sues for? He has shown no reason, nor can he show any.

The above is, in substance, the evidence given on the part of the defendant, leaving out all the evidence of a character as rebutting evidence, to that which I consider inadmissible and irrelevant as given by the complainant.

The undersigned has collected, in the above sketch, what he believes to be all the legal evidence given in the above cause, on either and both sides of the cause, and humbly conceives that when applied to the issue in the cause, upon those principles which govern courts of equity in their practice, clearly and manifestly show that the appellant is entitled to a decree against the appellee.

Your petitioner insists, that unless the plaintiff can invoke to his aid what he said and may have represented respecting his having loaned the negro, or what he did in the assessment and payment of the taxes upon the negroes, as mentioned in the record, there is not one particle of evidence in his favor, except the evidence gotten from the mouth of my client, the only witness, made, if at all, in casual conversations, when not on oath, and a long time since, in the presence of two old women and some two or three other persons, in no one of which conversations did he state that the negro, Hanna, was loaned to him and not given him, as stated in his answer, but in some two or three conversations, viz: in the presence of Mrs. Craig, Mrs. Snell and Samuel Martin, jr. They make him in substance eulogize or commend the way or plan of his father in loaning his negroes to his children, saying nothing about his own ne-

gro. These statements, the court will perceive, by examining the depositions referred to, were made, if at all, some 15 or 16 years since, about the time when the old man's daughter, Mrs. McGill, died, and when her husband, Mr. McGill, was going to return, with her only infant, and with the negro of his deceased wife, to Kentucky; a course of conduct by a father in law, about as well calculated to create a noise in a neighborhood or surrounding community, as any thing else that might occur; and if so made, no person would be more likely to offer to an *inquisitive gossip* some plausible excuse than the son.

The controversy and objections made by Wm. R., and the conduct of the father at his own house, show that there was no recognition by Wm. R. of the right of his father to the negroes. On the contrary, the disapprobation and dissent to the father's course, could not have been more sternly or positively expressed than it was, even to a greater degree than the duty of the son to the father can well be sanctioned. No stranger, with proper feelings and common decency, could have been warranted in saying more or doing more in an old man's house, had such a claim of right or such conduct been pursued towards his property. There is then surely no admission, nor any acquiescence on the part of William, in the assertion of claim, by word or by deed, on the part of the father. This gives rise to the consideration of what is an acquiescence by one in the claim of right to his property by another, so as to impair or affect his right. This doctrine can only exist, and is founded upon the principle, that a party having right to property permits another to hold and enjoy the adverse possession and use thereof, with knowledge on the part of the owner of such adverse enjoyment, &c., without asserting his right thereto. Such conduct on the part of the owner, gives rise to the presumption, that the right is with the possession, and by length of time the possession will ripen into a title, or constitute a bar to the claim of the true owner. What, I ask the court, could Wm. R. Martin have done, or what did he omit to do, more than he did, and has always done, in support and in confirmation of his right and claim to the property? He was in possession; none adverse to his. He did not wish to sell the property. No damages had accrued against his father for slandering his title, nor were any claimed. He could not have done any thing, by any proceeding in law or in equity, which could have added to his enjoyment of the property which he claimed and enjoyed as his own. Such was not the condition of the father. He acquiesced in the adverse possession of the son, and after the claim in his possession set up to the property by the son, it is not a little surprising, if he had any pre-



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tence of right to the property, that he did not take some steps to assert it, or at least threaten to do so.

Another circumstance, mentioned by the court, in the decision as being of weight as evidence is referred to, that is as to the claim of the property by the son, being based, not upon a gift, but upon a long and peaceable possession. The court upon looking into the evidence above referred to, will see that he did not so base his claim of right to the property, but that, when he was asked by a witness (old man Swan) what he had to show for the negroes, he replied that he had nothing but peaceable possession for a number of years. Now, interpreting the words of the son as thus replied, we are bound in reason to suppose that he meant to negative the idea that he had a bill of sale or title paper. And suppose that he did mean that he had nothing but a peaceable possession to establish his right, taking into consideration the time he acquired it, and the circumstances of it, including the relation which he bore, &c., to his father, all of which necessarily form a part of the matter to be considered in deciding upon the possession, his show of title. And what presumption, I ask, can be tortured out of the response to prove he had no title or right to the property, and to establish the right yet remaining in the father, or to prove that the father did not intend to give the property to the son, as the law presumed he did, by sending the property home with the son at the time of his marriage, &c., as aforesaid.

Then taking all the statements of the son, and this is all the evidence which has any legal place in the record, and it amounts to nothing more than the statements made by the son, not on oath, and is of all evidence the most dangerous and the most likely to be misunderstood, and least to be relied upon under such circumstances as are shown in this case. It is the testimony of one witness only, the party himself, which is set up and relied upon to outweigh the answer of the same party under oath, responsive to the bill, corroborated by the statements of the father, that the negroes were the negroes of the son, and by other persons who have proven facts sustaining the same, and corroborated also by the sworn inventory of the slaves of the estate of the father, by the plaintiff himself as administrator of the estate, in which no one of the negroes sued for is mentioned.

To be distinctly and clearly understood, I beg leave to state to the court the positions I assume and most confidently rely upon. They are these :

1st. That as the property sued for, is now and has been for twenty years and more in the possession &c. of Wm. R. Martin, used and en-



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joyed by him as his own, and which was delivered to him by the father, at the time of his marriage, without any evidence showing, that at the time of delivery, the same was intended, not as a gift by the father, the law premises it was a gift, and it devolves upon the plaintiff to prove by unequivocal evidence, that it was a loan, to entitle him to a decree. 1 Richardson's S. C. Rep. p. 310, 316, Eddings vs. Whaley; 5 Monroe Rep. 502, 3; 4 McCord's 229, 231 Byrd vs. Ward; 1 Nott & McCord 224, Brashear vs. Blassingham; ib. 224, Hatton vs. Banks; 4 Bibb 35; 3 Littell 136; 3 McCord 207; ib. 206.

2nd. That as the plaintiff has called upon the defendant to answer the bill of complaint, charging that the negro was loaned and not given to the appellant by his father, the denial of the allegation so made by the complainant, to be taken as true, unless by two witnesses and strong corroborating circumstances, the same is proved to be false. 7 Cranch 69; 2 Cond. Rep. 417; 3 Wheaton 520; 4 Cond. Rep. 311; 6 Wheat. 453, 5; Cond. Reps. 136; 5 Peters 99; 1 Wash. C. C. Rep. 230; Baldwin's Rep. 494.

3d. That in this case the answers of the co-defendants admitting that their negroes, received from the old man Martin, were received as loans, is no evidence that the negro of William R. was not given to him by his father, unless a father cannot give to one child and loan to another; and even if a presumption could arise that he would not so act, the fact of such lending to the co-defendants cannot be proved by their answers or admissions in this case, as they are heirs and interested as such in the estate sought to be enlarged by a decree for complainant, as administrator of the estate. 9 Cranch 153; 3 Cond. Rep. 319, 5 Monroe Rep. 411, Turner vs. Holman.

4th. That the old man Martin's statements and claim of the property, made in the absence of William, whilst the same was in the possession and use of William, from the time of his marriage, as shown in the record, is no evidence of right or title in the old man to the property, nor was the assessment and payment of taxes by him thereon, any evidence of his right, for the reason that no man can concoct or manufacture evidence for himself against another's rights, either by word or deed. 320 Iredell 210, Green vs. Harris; 7th new series Ala. Rep:

5th. That in this case there is no evidence in the cause, conducing to show that the answer is not true, except what is in the proof given of his declarations some twelve or eighteen years since, in the presence and hearing of Mrs. Craig, Mrs. Snell and Samuel Martin junior, respecting the loan of his negroes to his children by the old man, and that

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if such evidence be entitled to any weight, it and all the other statements which he may have made, of like nature, should be received with great caution by the court, under the circumstances of this case. See the following authorities: *Bottsford vs. Burr* 2 John. Ch'y. Rep. 411; 4 Monroe Rep. 239; *Stone &c. vs. Ramsay*; 10 Ves. 517, 518, *Linch vs. Linch*; 2 Barb. Rep. 26, 27, *Garrison vs. Akin*.

6th. That if the court give any weight to the evidence of the loose conversations of Wm. R. Martin, spoken of by Mrs. Craig and Mrs. Snell, then, the court is bound, in law, to treat all he said, though said at different times, as the testimony of only one witness, stated by him not under oath, and that in this case there are no circumstances proven by any legal testimony of any kind whatever, to corroborate the loose declarations alleged to have been made by the defendant, and of course, the answer must prevail.

7th. The testimony or evidence, in corroboration of the answer, independent of the answer, is stronger and entitled to more weight than the evidence given by plaintiff. The law presumes a gift from a parent to the child, when the property at the time of the marriage of the child, is delivered to him by the father, unless at the very time of the delivery, the same is qualified by something going to show the contrary, and in this case, nothing so appears from the record. 1 Richardson's S. C. Rep. *Eddings vs. Whaley*; 5 Monroe 5023. And in this case the great length of time the defendant has had and used the property, commencing at least twenty years before the suit, when Hanna was only seven or eight years old, the raising and nursing her children as well as herself as his servants, (an instance or case of the kind rarely, if ever, before known or heard of) coupled with the fact that the old man on two or more occasions, called and spoke of the negroes as Billy's (defendant's) negroes, taken in connection with the fact that the plaintiff himself, acting as an administrator, under oath, did not inventory these negroes as of the old man's estate, under the circumstances, with other facts showing the manifest injustice of wresting from defendant his property, are, all taken together, as above stated, apart from the answer, more than sufficient to counteract the proof of complainant.

P. R. HAYDEN.

Judge BRACH, delivered the opinion of the court.

The questions of multifariousness and of jurisdiction having been waived in the re-argument of this cause, and nothing appearing in the record from which it can be inferred, that the disposition of the property in question,

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was the subject of any statutory provision in the State where it occurred, the general conclusion we have aimed at in reference to the present and kindred cases, renders it unnecessary to attempt any further analysis of the testimony than may be sufficient to demonstrate, that it is apparently incapable of rational and reasonable reconciliation, there *should be a rule and there is one*, which, (to some extent at least) supplies the necessity of too distrustingly attempting it. That rule is furnished in the first and soundest southern adjudication to which we have been referred, being the report of a case, (Carter's Ex'r. vs. Ruland) decided in the supreme court of the State of North Carolina, toward the close of the last century, in which that tribunal lays down the doctrine intelligently and broadly, that "when a man sends property with his daughter, upon her marriage or to his son-in-law, or daughter any short time after the marriage, it is to be presumed *prima facie*, that the property is given absolutely in advancement of his daughter; and when the property is permitted to remain in the possession of the son-in-law for any considerable length of time, as in this case, it will be necessary to prove very clearly, that the property was only lent by the father; and that it was expressly and *notoriously* understood *not* to be a gift *at the time*. The peace of families and the security of creditors, are greatly concerned in the law being thus settled."

This original rule, as it may perhaps be not inaptly denominated, has been conformed to in many subsequent decisions in the same and other states; 1 Taylor 143; 3 Iredell 210; Geo. Decis. p. 1, 2, 166; 6 Ala. 250; 2 N. and M. 93; 1 McCord 213; 2 Bay, 528; 3 H. and M. 127; unfettered by registry laws, and stands commended in the present case by, perhaps the entire array of reasons upon which it was first predicated. Here, a father was in the habit of sending home with his children, each, upon their marriage, a negro slave, but in what *capacity* or with what *intent* they were thus sent or delivered, except *as inferred in the law*, we hear nothing for years, and then only under such *circumstances*, and apparently for such *purposes* as were not calculated to elicit such mutual, fair and *full* declarations as could alone, (if at all) be resorted to and repeated in such a contest as the present one. In addition to this and prominent above all, the parties and the witnesses are brothers, and relations, whose interests and whose feelings are excited and antagonistic, thus magnifying the reasons for which the law disfavors controversies so pernicious to morality, so unpropitious of equity in their final results and withal, and above all, so easily and so *naturally* avoidable, by a simple and fair declaration, at a time when, of *all others*, it would seem to be suggested.

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Whether the testimony upon the record sufficiently supports the assumption, that the ancestor in this case, continued to pay the taxes upon *the negroes in question*, or whether that too is left in too much doubt and uncertainty to operate as a ground of adverse *title*, at least for the space of two years, if not indeed until the still subsequent period, when the anticipated claims of creditors upon the negro in possession of *another* child, suggested the necessity of thus attempting to strengthen the *general* parental claim of *all* property, need not, we think, be here decided. The testimony is at least explicit, that as soon as it was brought to the knowledge of the defendant, that *that* might be relied upon as a circumstance to overthrow the *prima facie* title resulting from his possession, he too, gave in the slaves for taxation. In any view of the case, however, it seems to us scarcely conceivable or permissible, that if a *prima facie* legal title remitted, as we have seen, from the unconditional, and otherwise, unexplained delivery of the slave, upon the marriage of the son, it could be subsequently modified or affected by what may just as well have been regarded the *gratuitous* payment of taxes upon it as any thing else.

Supposing that the chancellor below, was uninfluenced in rendering the decree reviewing, either by the answers of the other defendants, (distributees,) or the testimony tending to show that loans and *not* gifts, had been made to the other children, (all that being inadmissible as against the defendant in this suit,) but that such testimony was admitted solely for the subordinate purpose which was intimated in the argument of the counsel for the appellee, it is still sufficiently perceivable, that upon the testimony, legitimately entering into the main question, different minds, alike upright and intelligent, might arise at different or diverse conclusions, as to the mere *preponderance* of the evidence, and decree accordingly. This consideration, however, instead of including us as under ordinary circumstances, it would do, to leave the decree undisturbed, but the more conclusively suggests an additional reason for the judicious and self denying application of some *fixed rule*, whereby, to extricate property thus situated from a peril so obvious and otherwise unavoidable.

If in our own State, our predecessors have not gone the entire length of the other southern benches alluded to, they have perhaps approximated it as nearly as the analogy of the respective cases would permit. In *Millikin vs. Greer*, (5 Mo. 489,) the negroes had been but a year or so out of possession of the ancestor, whereas, in the cases we have referred to, as in the case at bar, the negroes had not only been

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sent or delivered to the child, at or about the period of its marriage, without any thing being said "at the time" to otherwise denote the character of the transaction, than as inferred and fixed in the law, but had been suffered to remain, (as is presumable from analogy,) for periods covering the limitation to which the laws restricted the general admission of oral testimony. It was therefore, consistently enough holden by this court, in the case alluded to, that *such* a possession "did not amount to a gift," but was "strong evidence from which a jury might well presume one;" and although the Judge declared in the same case, that "to constitute a gift there must be words or writing of the presentance, and a delivery of the thing given," that declaration must of course be understood to have been predicated upon, and to apply to, the facts of the case then under consideration, for otherwise it were extra-judicial, and consequently unauthoritative. In any view of the case, therefore, it cannot be binding in a case like the present, where the analogies, and consequently the rule, are intrinsically different.

It is thus inferrable, that the principle difference between the majority of the former bench, and the majority of the present one, consists in part, perhaps, in the relative weight they have respectively attached to the possession of the property, under circumstances like the present, but mainly, doubtless, in the different estimates which they have formed, concerning the aggregate force and effect of the voluminous, circumstantial and conflicting testimony which is found in the record. Without intending therefore, to render an opinion which shall imperatively close the door upon the reception and consideration of even such testimony as appears to have been received and entertained in this case, we have no hesitation in the conclusion, that in all such, the evidence competent to disprove the gift, which the law but reasonably implies from such reception and possession as is established here, should be either of the clearest, most direct and uncontradictory character, or if in any sense conflicting, that the aggregate preponderance against the continued denials of an answer, and the *prima facie* title established by the law, should be overwhelming and conclusive to a degree which we are unable to deduce from the record before us.

Judge Ryland concurring in this opinion, the decree of the circuit court is reversed and the bill dismissed.



BRIDGES vs. BELL.

## BRIDGES vs. BELL.

If a witness is equally interested on both sides of a cause, he is competent; but if there is a clear excess of interest in favor of the party calling him, even for costs, he is incompetent.

## APPEAL FROM LAWRENCE CIRCUIT COURT.

## TODD for appellant.

1. The evidence of Deas ought to have been excluded: he was an incompetent witness. The title of the property was in dispute. The witness professed to have purchased it of defendant, and sold it to plaintiff. In law he was a warrantor of the title. 2nd Kent's Com. 478.

2. The contract was thus between Bridges and Deas. Deas was to crop with Bridges in 1846, Bridges furnishing him the use of two cows. Deas was, in the season, to make 1500 rails for a cow and calf obtained of Boucher by Bridges, and furnished Deas on the contract for cropping. This contract, the appellant contends, was a mutual executory contract for the sale of the cow, or was dependant and conditional, and that the law is, 1st. The two concurrent acts of making the rails and delivering the cow and calf, (unless an express agreement to the contrary) are mutual, and no action can be maintained without showing a performance. 2 Kent's Com. 464; 2 Tucker's Com. 333. There is no sale in such case without payment, unless expressly agreed to the contrary. 2 Tucker's Com. 357 and note. The party cannot take away the property without payment; *ibid* 357.

2. The possession of Deas, in law, of the cow and calf, was under the contract, for use only, whilst cropping, and he could acquire no possession or title under the contract to make rails, until he made payment.

3. The contract was executory, and no title passed to Deas. He conveyed none to Bell, and no demand of a calf (if made) could require Bridges to deliver the calf until the rails were made.

4. Under this view of the law, the whole of plaintiff's instructions ought to have been refused, as misleading, and not legal instructions.

6. Those of the defendant's should have been given, particularly the 5th, 6th, 9th, 10th, 11th, and 12th, their substance being that, although Deas may have contracted for the sale of the calf to plaintiff, yet the title of Bridges could not be divested of the cow or calf, until Bridges got his 1500 rails for them.

The plaintiff moved and had excluded the testimony of John W. Lynn. This witness testified to the same facts, occurring in the same conversation related by plaintiff's previous witness, Boswall, and the appellant insists thereon the following points:

1. The testimony of both was legal to show facts whether a sale had or had not been made by Bridges to Deas, and Deas to Bell, and the character of possession as connected with a sale.

2. If it was not legal, yet when the statements of a party are offered in evidence by one party, whatever was stated in the same conversation, whether adverse to the interests of the party offering the evidence or not, is admissible. 7. Mo. Rep. 348. And although a plaintiff offers and gives illegal evidence, the defendant may give the same kind of evidence to rebut. Newlin & Foster, 4 Mo. Rep. 18, and explanation in 5 Mo. Rep. 42.

3. Upon this view, then, the court erred in refusing leave to defendant to enquire of the witness detailing this conversation of Deas and Bridges, "whether at that time and in their conversations, their contract about the cows, and the sale of one to Deas, was related over by the parties."



BRIDGES vs. BELL.

## HAYDEN for appellee.

1. The court did not err in admitting the evidence of plaintiff which was objected to by defendant, nor in excluding the evidence which was offered by the defendant upon the trial of the cause.
2. The circuit court very properly gave the instructions to the jury, as to the law of the case, as moved by the plaintiff.
3. The court did not err in refusing said instructions which were rejected by the court, as asked for by defendant; because the instructions given by the court contained and advanced the whole law of defendant's case.
4. The court very properly overruled the motion for a new trial made by the defendant.

## Judge BIRCH delivered the opinion of the court.

In the spring of the year, 1846, one Deas contracted with the appellant, Bridges, to split him 1500 rails during the approaching fall, for a cow and calf. The stock was accordingly delivered to Deas, who subsequently, in the month of July, sold the calf to Bell, the appellee. Bridges refused to deliver the calf to Bell, as the rails had not been made, whereupon Bell sued him before a justice and recovered a judgment. Bridges carried it to the circuit court, where Bell again obtained judgment, to reverse which the case is brought here. The record is long, but the foregoing are the substantial and governing facts, as *found by the jury* under the instructions of the court.

As to the objection that Deas was not a competent witness, the application in this case of the authority to which we have been referred in 2nd Kent, is unperceived. From the testimony in the record, it can scarcely be supposed that the circumstances were such, and that the witness had so acted as to incur any liability to the plaintiff for costs; and he not only swears that he has *no* interest in the event of the suit, but the same conclusion is apparent from the tenor of *all* the evidence, namely, that if the plaintiff gained the suit, the witness would remain bound to the defendant for the value of the calf, and vice versa, if the suit terminated in favor of the defendant. His interest, therefore, if not entirely balanced, was at least of that doubtful character which could not go to his competency, but to his credibility alone. We may as well add, that if the application of general principles left any doubt upon our minds in a case like the present, the spirit and meaning of a well known statutory enactment, of our own, would still further confirm us, that the testimony was properly received.

Without perceiving or admitting that in a case like the present, a demand of the property was necessary before the commencement of the

## BRIDGES vs. BELL.

suit, it may be remarked that this witness also established that fact. Supposing, therefore, that the opinion already expressed in support of his competency, will readily suggest the concurrence of this court with the finding of the jury, we but superadd the instructions upon which the case was submitted to them, as comprehending our estimate of the entire law in similar cases. For the plaintiff,

1. "If the jury believe from the evidence, that Bridges sold the calf to Deas on a credit, then Deas had a right to sell it to Bell, whether he ever paid Bridges for it or not, and Bell is entitled to recover its value, if he purchased it from Deas.

2. Even if the sale by Bridges to Deas was conditional, yet if Bridges let Deas have the apparent ownership of the calf, then Bell, by buying from Deas, obtained a good title, and is entitled to recover.

3. Whatever may have been the conversation between Bridges and Deas at the time of the arbitration, if Bridges before that time had sold the calf to Deas, and Deas had sold it to Bell, then Bell had a good title and is entitled to recover.

4. If the jury believe from the evidence, that Bell was the owner of the calf, at the time he brought his suit before the justice, and that he had a right to the possession of it at the time, they should find in favor of Bell, although he may not have had actual possession of the calf.

5. If they believe from the evidence, that Bridges sold the cow and calf to Deas for 1500 rails, to be paid in the fall, and let him have the possession of the same, and that Deas afterwards sold the calf to Bell, previous to the institution of this suit, they must find in favor of Bell, unless it has been proven that Deas was not to have the cow and calf, until the rails were made."

For the defendant. 1st. "Unless the jury believe from the evidence, that Bell had the actual possession, or the right to immediate possession of the calf in question, at the time of bringing suit, they must find for defendant, Bridges.

7. If the jury believe from the evidence, that the cow and calf were not, by the contract between Bridges and Deas, to be the property of Deas until the rails were made, the title did not pass to Bell by the sale of Deas, and Bell cannot recover, unless they believe from the evidence that Bridges, gave Deas the possession of the calf, prior to the sale to Bell.

13. If the jury believe from the evidence, that the possession of the calf by Deas, was consistent with the contract made by Deas with Bridges, then the apparent ownership of the calf, if the contract was

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conditional by Deas, gave no title under the purchase of Deas from Bridges, and could confer no title on Bell, and defendant (Bridges) ought to recover."

There were other instructions asked by the defendant, and other points manufactured in the case, but it is deemed unnecessary to further consider or remark them, than by alluding to the point of the 3rd. instruction, and contrastively commending that general professional strength and fairness, which, nobly disdaining the deruier attempt we sometimes regret to witness, perceives correctly that the path, alike to eminence and success, lies at last in the emulation to elucidate and *enforce* rather than confuse and mislead. One course looks apparently and considerably to the *end*, whilst the only effect of the other has been, and must ever be, ruinously to *protract* the most petty litigation. Judgment affirmed.

## ELLINGTON vs. CROCKETT.

Judgment of non-suit given against a party by a justice of the peace, will not bar him from instituting a new suit for the same cause of action.

## APPEAL FROM PLATTE CIRCUIT COURT.

## STATEMENT OF THE CASE.

Crockett, the appellee instituted his action of debt in the court of A. Hill, a justice of the peace of Platte county against the appellant, Ellington, and recovered a judgment against the defendant for the sum of \$38 07 together with the costs of the suit, on the 11th day of March 1848, from which judgment Ellington appealed to the circuit court on the 20th day of the same month.

On the 11th day of March, 1848, and before the trial of the cause, Ellington moved the court, (viz. the justice on the day of trial) to quash the proceedings before said Hill, then had, upon the ground that there had been a former trial of the same cause of action on the 19th day of October 1848 before one H. D. Oden, a justice of the peace of the same county. At the time of making this motion, a bill of particulars of the claim, as filed before justice Oden, was filed with said justice Hill.

At the September term 1848, of the circuit court, the cause was tried therein, and the plaintiff recovered judgment against Ellington for the sum of \$33 "in damages," which were adjudged for the plaintiff by the court, against the defendant, with his costs of suit.

The defendant then moved the court to set aside the verdict and for a new trial, and the same being overruled he has brought the case here by appeal.

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Upon the trial of the cause, the plaintiff introduced the defendant himself, and it was admitted by the counsel for the parties in the cause, that the testimony offered by the plaintiff fully supported the verdict rendered by the jury in the cause; and thereupon the plaintiff rested his case.

The defendant then offered the said Henry D. Oden, the justice before whom the cause had been previously tried, as above stated in said motion to quash the proceedings of Hill. This witness, Oden, proved and it was admitted by both parties, that the same account on the part of the plaintiff and the same account on the part of the defendant, as a set off, was filed before the said justice Oden, who was then an acting justice of the peace of Platte county, as described in a certified transcript from his docket, which was produced on this trial, which docket of Oden, containing a record, &c. of his proceedings in the cause, when tried before him, was offered in evidence by the said Ellington. To the reading of which record of Oden the plaintiff, Crockett, objected, and his objection was sustained, and the defendant excepted.

**HAYDEN, for appellant :**

1. The court erred in objecting as evidence the record and proceedings of justice Oden, before whom the claim sued for had been adjudicated and decided against the plaintiff. This record shows that Crockett sued Ellington for the same identical demand, on the 17th day of January 1848, and that on the 5th day of February, following, the cause was continued until the 19th day of that month, on account of the sickness of the justice Oden, for trial, the same being upon the application of the plaintiff Crockett. On the 19th day of February 1848, the justice, Oden, rendered a judgment in the action against the plaintiff for the costs of the suit in favor of the defendant.

The justice then on the 21st day of February 1848, proceeded to hear the same cause again, and the plaintiff then called on the defendant to swear as a witness, and he gave evidence as such, and the justice thereupon, after fully and maturely considering the matter, coming to the conclusion that he had committed error in continuing the cause to another than his regular law day, quashed his own proceedings upon his own mere motion, non-suited the plaintiff and rendered judgment against him for the costs of the suit, amounting to \$11 90. These were the proceedings had before and by justice Oden, proposed to be given as evidence by Ellington. We insist that the first judgment rendered on the 19th day of February, by Oden against the plaintiff, for the costs of the suit, was a final judgment, and the subsequent proceedings before Hill, for the same claim, were unauthorized; and that the record, &c. of the proceedings before Oden was, and is a bar, and ought to have been read as evidence of the facts therein stated, as such.

2. We also insist for the same reasons, that the circuit court ought to have set the verdict aside, as also for another reason, which is that the verdict is against law and evidence.

**RYLAND Judge, delivered the opinion of the court :**

The important question for our adjudication in this case, involves the correctness of the action of the circuit court, in refusing permission to the defendant below, to read the record of the proceedings had in the suit between the same parties before Esquire Oden, for the same account due plaintiff by defendant, as well as for the same offset of defendant against plaintiff. We consider this the only point in the case.

The justice, Oden, before whom the suit was first brought, was sick at

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the day fixed for the first trial, and he continued the case at the costs of the plaintiff, and issued a new summons for defendant. On the day to which he had continued, the parties appear, and the defendant moves to quash the proceedings. The justice overrules the motion, hears the evidence. The defendant is sworn as a witness himself. The justice fails to determine the matter on this day, but continues it under advisement for a day or so, and at last comes to the conclusion that he had committed error in the case, that he had done great injustice to one of the parties, and probably to both; that it was his duty to retrace his errors as soon as possible and correct them. He therefore says in his record, "he conceives it to be his duty to quash the proceedings, non-suit the plaintiff, and tax him with the costs. Judgment is therefore given by the justice against the plaintiff, for the sum of eleven dollars and ninety cents." These are the words of the transcript. Below, in the same transcript, he marks down the costs, the items and to whom due, and they amount to the above sum of \$11 90. We can plainly see, that the judgment was entered only to be for costs, yet, the defendant insists, that this was a final judgment upon the merits of the case; and that upon such merits he obtained the judgment; notwithstanding his own testimony given, induces two juries after this trial before justice Oden, to find against the defendant two other verdicts upon the merits.

I am by no means willing to apply to the illiterate transactions of the justices of the peace, the same strict technical rules that I would apply to the proceedings of our courts of record. These justices are generally plain common sense men, with no acquaintance with the forms or modes of judicial proceedings. They may often mean one thing, when their words recorded and written down, if construed technically, would mean a different thing altogether. Here it is plain that justice Oden meant to do no harm, no wrong to either party. He says he wishes to retrace his steps and correct his errors. "Therefore he must quash the proceedings, non-suit the plaintiff and tax him with the costs," but in putting his intentions on record, he uses the language of a final judgment and not of non-suit. I will not lend my aid to do the plaintiff any further injustice in this case. He seems to have had to pay the costs at every blundering step made in the case. The circuit court did right in rejecting this record of Esquire Oden. It did not exhibit a full adjudication upon the merits of the transaction between these parties. It was intended for a non-suit, and as such it was properly consid-

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ered and properly rejected. It is my opinion therefore that its judgment should be affirmed, and such is the opinion of my brother judges.

Let the judgment of the court below, therefore, be affirmed.

## RICHMOND vs. CROSS.

A person interested in an estate as distributee, is a competent witness to prove facts, which increase the liabilities of the estate—such testimony being against his interest.

## ERROR TO RANDOLPH CIRCUIT COURT.

## STATEMENT OF THE CASE.

This is an action brought in the Randolph circuit court, by Cross vs. Richmond, on a bond for the payment of money, purporting to be executed by the defendant below, (Richmond,) and one Howell S. Rose. At the return of the process served upon Richmond, who was alone sued, he put in the ordinary plea under our statute in force at the time, and also the plea of *non est factum*, supported by his affidavit. The plaintiff moved the court to strike from the files, the plea of *non est factum*, which motion the court overruled, and the plaintiff took issue upon both pleas. At the trial of the case, the plaintiff introduced various witnesses for the purpose of proving that the said Richmond, executed the bond. Among the witnesses the plaintiff introduced, was Mrs. Loe, who was the relict and widow of Howell S. Rose, one of the obligors to the bond, (Rose having died before the commencement of this suit.) To her introduction as a witness, Richmond, by his counsel objected, but the objection was overruled and she permitted to testify. After the evidence in the cause was closed, the court at the instance of the plaintiff, gave the following instructions.

1st. "That if the jury believe from the evidence, that the defendant made his mark which is on the bond, they will find for the plaintiff."

2nd. "If the jury believe from the evidence, that the defendant authorized Howell S. Rose to sign his, defendant's name to the bond, and that said Rose did, in pursuance of said authority, sign the name of the defendant to the bond, then they will find for the plaintiff."

3rd. "That the acknowledgements of the defendant, against himself, are to be taken as evidence." To the giving of which the defendant objected.

The defendant then asked, and the court gave the following instructions.

1st. "That before the jury can find for the plaintiff, they must believe from the evidence, that the defendant did execute the bond sued on, himself, or that he authorized some one to execute it for him."

2nd. "That unless the jury believe from the evidence, that the defendant executed the bond sued on, in this case, or authorized some person to execute it for him, they will find for the defendant."



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3rd. "That the declarations of the defendant, given in evidence, are to be considered all together, as well what is in his favor as what is against him."

The case was then submitted to the jury, and a verdict was found for the plaintiff for the amount of the bond and interest.

A motion for a new trial was made, and the reasons relied upon were: 1st. That the court erred in permitting Mrs. Loe, the widow of Rose, the co-obligor to testify.

2nd. That the instructions given the jury for the plaintiff, (and particularly the first one,) were unauthorized by the law and facts in this case, and were well calculated to and doubtless did mislead the jury, and,

3rd. That the verdict of the jury was not warranted by the evidence.

This motion being overruled, the defendant moved in arrest of judgment, which was also overruled, and the case is brought here by writ of error.

### CLARK, for plaintiff in error.

1. It is insisted that Mrs. Loe, the widow of Rose, the joint and co-obligor in the bond sued on, was clearly an incompetent witness, and ought not to have been allowed to testify. There is no principle better settled, than, that in a suit by the payee against one or two obligors, the one not sued, cannot testify for the plaintiff to establish the execution of the note or bond by the defendant; it being to his interest to make the defendant equally liable with himself, and if Rose, the co-obligor could not have testified in his life time, it is equally clear, that his widow cannot after his death. The same reasons that excluded him, excluded her, she being interested in the same way, though not to the same extent.

It will be remarked, that the question to be tried in this case, was not whether the defendant was a security or principal obligor, but it was whether he executed the contract at all. 1 Greenleaf sec. 331, 12 Ohio Rep. 275, 475.

2. This being a bond, no authority to execute it by the defendant was binding upon him, unless in writing and under seal. No one, I suppose, will controvert this proposition. If so, then the instructions to the jury, for the plaintiff were erroneous, and calculated to impress upon the minds of the jury, that even a verbal authority was sufficient to bind the defendant; and the jury, no doubt, acted under this impression, for there is not a word of evidence of any written authority to any one. But in any view of the case, the first instruction is wrong. That instruction tells the jury, in so many words, "that if the defendant made the mark then on the bond in suit, he was liable, and that they must find against him in his plea denying the execution of the bond." We had supposed something else was necessary to execute a single bill obligatory, by one who cannot write besides making his mark. The fact that the mark was made by the defendant, is evidence of his executing the bond, but is certainly not conclusive. 22 Wend. 325.

3. The next point we make is, that the circuit court ought to have granted a new trial. This point must be sustained if either of the others is correct, or if there was no evidence, or an insufficient amount of evidence to warrant the finding of the jury. We are apprised of the various and repeated decisions of this court, in reference to reviewing the action of the circuit courts, in refusing new trials, but in this case there is no evidence of any legal authority to execute the bond, nor is there any evidence that the defendant executed it himself. The verdict is therefore so manifestly wrong, that the circuit court ought to have set it aside, and not having done so, its judgment ought to be reversed.

### WILSON, for defendant in error:

I insist that Mrs. Loe was properly admitted by the courts to testify in this cause. All the witnesses testify that Richmond was security only for Rose, and a witness also testified that Richmond signed the bond as security for her husband. She, then, was testifying against her

## RICHMOND vs. CROSS.

interest, as in the event of a recovery against Richmond, the liability of the estate of her husband was increased, not only by the amount of the cost in the case, but also the amount of the interest after the judgment. *Garrett et al vs. Ferguson's adm'r.* 9 Mo. Rep. 125.

The court gave all the instructions asked by the parties, and there is no essential difference in the instructions asked by the parties and given by the court.

The plaintiff in this court, objects to the first instruction as given by the court below at the instance of the plaintiff in that court, which is in the words following: "That if the jury believe from the evidence, that the defendant made his mark which is on the bond, they will find for the plaintiff." I can see no objection to this instruction; if he made his mark as appears on the bond, it was an evident execution of the instrument, and which is the manner in which all persons, unable to sign their names, usually execute all instruments.

2. The plaintiff in this court, now attempts to set up, "that this being a bond no authority given by him to execute it, was binding, unless in writing under seal." This point was not made in the court below, and cannot now be set up in this court. I do not, therefore, feel called upon to further notice this point.

RYLAND Judge, delivered the opinion of the court :

The only question which demands the attention of this court, from the above statement, is the one arising from the admission by the circuit court of the evidence of the witness, Mrs. Loe, for the plaintiff.

From the bill of exceptions in this case, it appears that the bond was signed by Howell S. Rose, and John Richmond, Richmond making his mark. Richmond denied the execution of this bond and the execution of it by him was put in issue. The witnesses state, that Rose was the principal and Richmond his security. Indeed the evidence is plain and amply sufficient to show that Richmond was security. Mrs. Loe, the witness, was the widow of Howell, S. Rose, having married Loe after the death of said Rose. Her evidence then, is calculated to increase the demands against the estate of the deceased husband, by showing, that Richmond was security for him on this bond, and not a joint principal obligor merely. Her testimony then, is against her own interest, for by it, she increases the liabilities and incumbrances of the estate of which she is entitled to part as widow of the decedent. Her testimony is against her interest and consequently not liable to the objection made to it by the defendant. The court therefore, committed no error in admitting her evidence for the plaintiff, and her testimony warranted the court in giving the first instruction asked for plaintiff and completely overthrows the force of the second point relied on by plaintiff in error, viz: the authority given by Richmond to execute the bond.

We are of opinion that the circuit court committed no error in giving the instructions, nor in admitting the evidence of the witnesses. That the case was fairly submitted to the jury and we find no sufficient reason to interfere with the judgment below. It is therefore affirmed.

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 TEMPLETON vs. JACKSON.
 

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### TEMPLETON vs. JACKSON.

Defendant executed a deed to plaintiff, in which he acknowledged the receipt from plaintiff of six hundred dollars, and warranted to him a pre-emption title to a quarter section of land. Owing to conflicting claims to the land, the plaintiff was enabled to enter only eighty acres of the land described and eighty adjoining it. Plaintiff instituted an action of assumpsit upon the common counts to recover the six hundred dollars.

Held, that the action could not be maintained.

#### APPEAL FROM HOLT CIRCUIT COURT.

#### EDWARDS & JONES for appellant.

1. The contract under which the 600 dollars were paid by plaintiff to the defendant, is void, being in violation of the pre-emption laws U. S. See act of Congress; 9 Mo. Rep. p. 263. The court therefore erred in refusing to give the second and third instructions asked by the plaintiff.

2. Admitting the contract under which the money was paid to be valid, and not in violation of any law, then the plaintiff is entitled to recover the money paid under it, if it was paid without any consideration, notwithstanding the special contract. 19 John. Rep. 74.

3. If the defendant failed to comply with the terms of the contract, and the consideration thereby failed, the plaintiff is entitled to recover the money paid on it in this action, notwithstanding the contract is special. 12 John. Rep. 364.

4. The contract under which the 600 dollars was paid, being illegal, executory, and unexecuted, the plaintiff has a right to recover it back in this form of action. 10. Mo. Rep. 205; 1 Wheat. Selwyn, 85.

5. The fourth instruction given for the plaintiff, declares the law to be, "that any compromise between plaintiff and Sharp could not affect the right of plaintiff to recover." And the 3rd instruction given for defendant declares the law to be, "that if plaintiff by compromise or otherwise, entered a portion of the land, then he could not recover." These two instructions are not only in direct conflict and against each other, but the third instruction assumes, that under the law, the defendant had a transferable interest in the land that would constitute a good consideration for the money paid, which is also in direct conflict with the 5th and 7th instructions given on the part of the plaintiff.

6. The court erred in refusing to give the 6th instruction prayed by the plaintiff.

#### HAYDEN for appellee.

1. There is no evidence in the cause, given by the plaintiff or defendant, conducing to sustain the plaintiff's action with reference to the whole or any part of the money demands, specified in the bill of particulars filed by him in this cause, nor to sustain in any wise his said action. 5. Cow. Rep. 195, Miller vs. Watson.

2. That if there were proof in the cause sufficient to show that there had been a partial failure of the consideration for which the \$600 were paid by plaintiff to the defendant, the present action cannot be maintained to recover the amount of such failure. The remedy would and must be upon the warrants or covenants contained in the deed of conveyance, by which the defendant conveyed the land and bound himself to the plaintiff, if at all. 5. Cow. Rep.

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195, 196; 16 Peter's Rep. 327; 4 Cranch. 239, Young vs. Preston; Paulsel & Clendenen, 2 Mo. Rep. 230; 2nd T. R. 100; 2 Strange 1027; Coke Jac. 506, 598; 1 Chitty Plead. 945, note B; 6 Cow. 449.

3. If the agreement between plaintiff and defendant for the sale and purchase of the land, had been by parol, instead of being by deed, as it is, the plaintiff could not recover the \$600 which he paid for the land, as for so much money had and received by defendant or otherwise in this form of action, under the circumstances of this case, without first having placed, or offered to place the defendant in *statu quo* with reference to the land; and in this case there was no such evidence offered or given in the cause. Cow. 449, Douglass Rep. 471.

4. There is no evidence, apparent in the record, that the land or the claim of Jackson to the land, with his improvements thereon, was or is such an one as he was by law prohibited from selling to the plaintiff, so as to render the contract or sale such as to deprive him of the right to retain the \$600 received by him as against the defendant, who is as innocent as the plaintiff, if there be any guilt in the transaction, which is denied. The law being that where a party divests himself of his money or other valuable thing, against its mandates, he cannot invoke its aid to regain or reinvest himself with it. 2. Marshall, 208; Gray vs. Roberts, 1 Pirtle Dig. 59.

5. That if by law an action of assumpsit would lie, to recover the consideration for lands sold and conveyed by deed (as the land was in this case) with covenants of warranty, yet, as is stated in the 3rd point, above made, the plaintiff was bound to show that he had placed the defendant in *statu quo*. Nor can the plaintiff recover in this case for another reason, apparent from the proofs in the cause, which show that the defendant, Jackson, and Templeton compromised the matter to the entire satisfaction of Templeton, by Jackson's paying tavern bills, witnesses fees, \$50 in cash, and procuring for him, in lieu of one-half of the quarter sold him, the half of another adjoining quarter, making up the number of acres sold. And under such circumstances it would be against equity and good conscience to refund the money paid to Jackson. His claim, therefore, was satisfied, or at least waived by his contract. 16 Peters, 327, Fresh vs. Gibson; Douglass 471; 6 Cowen Rep. 449.

6. The court did not err in declaring the law to be as moved by the defendant in his instructions, nor in rejecting the instructions as prayed for by the plaintiff.

Judge BIRCH delivered the opinion of the court.

In this case, which was an action of assumpsit upon the common counts, the plaintiff read in support of his right to recover, a deed executed by the defendant, acknowledging the receipt from the plaintiff of six hundred dollars, and warranting to him a pre-emption title to a quarter section of land. Upon a compromise with other conflicting claimants at the land office, the plaintiff was permitted to enter one-half of the land thus conveyed to him, and another half quarter section adjoining it. There was testimony that the plaintiff professed himself satisfied with the arrangement which the defendant had been instrumental in thus procuring to be made for him. This, however, is deemed immaterial, as the question upon which the case turned in the circuit court, and the only one material to be considered here, is whether the action of assumpsit was maintainable under such circumstances, or whether

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the plaintiff must not proceed (if at all) either upon his covenant of warranty, or by bill in equity.

Although the tendency of modern jurisprudence has been to somewhat enlarge the scope of the action adopted in this case, we find no authority, either in the text books or reports, which would justify us in allowing it the latitude necessary to a recovery here. On the contrary, we have met with numerous analogous negative adjudications, with the reasoning of which we entirely concur.

Let the judgment of the circuit court be therefore affirmed.

### SCOGGINS vs. WILSON ET AL.

An instruction which, in effect, tells the jury that they must find a verdict for either party, is erroneous, and it is good cause for reversing a judgment.

#### APPEAL FROM ATCHISON CIRCUIT COURT.

#### STATEMENT OF THE CASE.

Elizabeth W. Scoggin sued Henry B. Roberts, Robert Wilson, Hiram Rich, William Cunningham and Samuel P. Burnet in trespass, in the Atchison circuit court, for taking and converting to their use, one trunk and its contents, consisting of about 300 dollars. To the declaration, the defendants plead the general issue. The plaintiff then filed a petition for discovery. Rich and Wilson answered, and the others failing to answer according to the order of the court, the facts stated in the petition were ordered to be taken as confessed. The case was then dismissed as to Cunningham, and tried by a jury as to the other defendants. On the trial, the plaintiff read to the jury the answers of Rich and Wilson, the petition for discovery and the deposition of Warmcastle, and also examined one Hardin as a witness. The evidence shows that Rich and Wilson had executions against said Hardin, and that James P. Burnes, as constable, assisted by Roberts and Cunningham, levied said executions upon plaintiff's trunk and money, in amount about 250 or 300 dollars; and that Hardin paid no money on said execution, and Wilson received on said executions 220 dollars of said money.

The court then gave to the jury the following instructions on the part of the plaintiff.

1. "That if they believe from the evidence, that the defendants took a trunk and money of the plaintiff and converted the same to their own use, or the use of any or either of them, they will find for the plaintiff."

The plaintiff also asked the court to give the following instructions, which were refused by the court.

SCOGGIN vs. WILSON et al,

2. "That if only a part of the defendants were personally present at the time the property was taken, and those who were not present afterwards consented to the trespass, they so consenting, are liable in this case."

3. "That if they believe from the evidence, that money and property was levied upon by part of said defendants, to satisfy an execution in favor of Rich and Wilson, and that defendant, Wilson, afterwards received a portion or all of the money made by such levy, then they are liable in this action."

The court gave to the jury the following instruction on the part of defendants, to wit:

1. "That the answers of Rich and Wilson, not being contradicted by other evidence, are to be taken as true, and if so taken, they will find for said defendants, Hiram Rich and Robert Wilson."

The plaintiff then took a non suit, and filed a motion to set it aside and for a new trial, which said motions being overruled by the court, the plaintiff excepted and has brought the case here by appeal.

### EDWARDS & JONES for appellant:

1. In trespass all are principals, and those who direct or assent to a trespass for their benefit, are equally liable with those who actually commit it. (7 Mo. Rep. 176.) Burnes, as constable, at the instance of Roberts, as agent of Wilson and Rich, levied an execution in favor of said Wilson and Rich on the property of plaintiff, and said Burnes and Roberts afterwards paid Wilson \$220 of the money of plaintiff. The acts of Burnes and Roberts, as the agents of Wilson and Rich, were the acts of Rich and Wilson. "*Qui facit per alium, facit per se.*" But if the acts of Burnes and Roberts, as the agents of Wilson and Rich, did not render them liable, yet as the trespass was committed for their benefit, and Wilson having afterwards received the money, thereby assented to the trespass, and renders them liable in this action; therefore the court erred in refusing to give the 2nd and 3rd instructions asked by plaintiff.

2. The instruction given on the part of Rich and Wilson takes the whole case, so far as they are concerned, from the jury. The court, therefore, erred in giving it. 6 Mo. Rep. 72 and 73.

3. It is error for a court to tell a jury, that a certain fact had been proven, or that they must believe the evidence or any part thereof. 8 Mo. Rep. 226, 7, 8, 9; 4 Mo. Rep. 106; Ibid 356. Therefore the court erred in giving the instruction on the part of Rich and Wilson, as the court assumes in that instruction, that there is no evidence contradicting their answers, and that the jury must, therefore, believe their answers true and find for them. This instruction is not only wrong as invading the province of the jury, but it is wrong because it assumes the law to be that the plaintiff can't recover, unless she can contradict the answers.

4. An instruction, not predicated on the evidence in the cause, is erroneous. (8 Mo. Rep. 224.) The instruction given for plaintiff, and the one given for Rich and Wilson, are contradictory, and one of them ought to have been withdrawn from the jury. (4 Mo. Rep. 279.) The instruction given for plaintiff assumes to be predicated upon evidence that would warrant the jury in finding against all the defendants, whilst the one given for Rich and Wilson, declares that there is no evidence against them, and that the jury are bound to find for them. One of these instructions, therefore, should have been withdrawn from the jury.

5. The strength and sufficiency of evidence should be left to the jury. (4 Mo. Rep. 356.)

RYLAND, Judge, delivered the opinion of the court.

From the above statement, it will be apparent that the act of the court



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HURST & SALMON vs. ROBINSON.

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below, in giving the instruction for the defendants, Rich and Wilson, as appears in the record, is the principal ground of complaint.

The instruction is set forth in the statement of the case, and is in our opinion erroneous. It takes the case from the jury, and means nothing more nor less than a positive direction for the jury to find for the defendants, Rich and Wilson.

Similar instructions have heretofore been declared by this court a sufficient ground for its interference, and we see no good reason for a departure from our future course.

Let the judgment be reversed and cause remanded.

### HURST & SALMON vs. ROBINSON.

1. If the parties to a suit have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one, is evidence against all.
2. Where the circuit court gives an instruction to the jury, embodying the principles of law, applicable to the facts of the case the supreme court will not reverse the judgment because the circuit court refused an instruction which was the converse of the one given.

### ERROR TO MORGAN CIRCUIT COURT.

#### STATEMENT OF THE CASE.

Ezekiel J. Salmon and John Hurst, who were partners in blacksmithing, carrying on their business under the firm of Hurst & Salmon, on the 28th of November, 1846, commenced suit before a justice of the peace on a blacksmithing account against the defendant in error Robinson, amounting to \$34,33. A trial was had before the justice, and the plaintiffs in error obtained judgment, from which judgment Robinson appealed to the circuit court of Morgan, in which court a trial was had at the October term, 1847, which resulted in a verdict for the plaintiffs in error, which verdict was at the same term of the circuit court set aside and a new trial granted. At the October term, 1849, another trial was had, and the case was submitted to the court sitting as a jury, which resulted in a verdict, and judgment for the defendant in error. A motion for a new trial was made and overruled, and exceptions duly taken. While the case was pending in the circuit court, Robinson caused the deposition of one of the plaintiffs, Hurst, to be taken, which deposition was by the court suppressed, but on the trial, the court permitted Robinson to read the admissions of Hurst, which were contained in his suppressed deposition. At the time the deposition was taken, the partnership had long previously been dissolved. On the trial of the cause, the last time, various instructions were asked, both by the plaintiffs in error, and defendants in error. The admission of Hurst's declarations as contained in his

## HURST &amp; SALMON vs. ROBINSON.

suppressed deposition, the giving of the 2nd. instruction asked by the defendant in error, and the refusal of the first seven instructions asked by the plaintiff in error, and the refusal of the court to grant a new trial, are assigned for errors.

### KOWNSLAR, for plaintiffs in error.

1. An examination of the evidence in this cause, will show, that Robinson sought to prove that he had discharged the account sued on, by delivering farm produce, and it is believed that the evidence clearly shows, that whatever amount was delivered, was for the sole and separate use of Hurst individually. The instruction given for the defendant in error, being the second asked for, makes no distinction between farm produce, supplied for the firm, and produce supplied to Hurst, which it should have done. The instruction then, if this be correct, is not merely defective but is erroneous, and in some degree contradicts the 8th. instruction, given for the plaintiff in error. As to the power of a co-partner to bind his firm—see 3d. Kent. Com. 43, and the cases there cited, (third edition.)

2. The court ought to have admitted the evidence of D. Williams, and ought to have given the 2d. instruction asked for by the plaintiffs in error. All partnerships are more or less limited, and the agency implied by law, is confined to business transacted within the scope of the partnership. If one partner goes beyond that, the law no longer presumes that he is acting as the agent of his firm. The world is bound to take notice of the objects of the partnership business, and the extent of the agency implied by law among co-partners—see Kent. 3rd. vol. pages 41, 42, 43, side paging, also page 44 and cases there cited.

3. The admission of Hurst's declarations, as contained in his deposition, was clearly illegal for several reasons. Our statute provides a mode by which a party to a suit can avail himself of the testimony of his adversary, and in *Levy vs. Henley*, 8 Mo. Rep. 510, this court has decided, that a party cannot examine one of several of the opposite parties, but that *all* have a right to testify. If it were allowed a party to take a deposition, and when it had been suppressed, read it as evidence, then he could thus by an indirect mode, obtain the evidence of one of several parties, and exclude the rest. Hurst, too, was bound to testify, or submit to the penalty of a refusal, and in this view, his admission was objectionable; for admissions to be evidence, must be free from suspicion of collusion, restraint and the like.

4. The admission of a co-partner, after the dissolution of the co-partnership, of matters relating to the partnership transacted during its existence, is not evidence against any one but the person making it. *Bell vs. Morrison*, 1 Peters Rep. 371, 2, 3 and 4; 3 John. R. 537; 15 John. R. 423; 9 Cowen 59, 433, 434; *Little vs. Ferguson*, 11 Mo. Rep. 598. There is no distinction between the admission of an account, and the admission of a particular fact. 9th. Cowen 434.

5. The court, sitting as a jury, decided the cause most manifestly against the evidence. An examination of the evidence, as preserved in the bill of exceptions, can leave no doubt, but that Hurst, was contracting for farm produce for his own individual use, and that this fact was known to Robinson. I do not understand the rule, as established by this court, to be, that they will not review the evidence, when it has been passed on by a jury, or the court sitting as a jury. I only understand that they will require a strong case to interfere. It is respectfully submitted that this is a strong case, and it must strike every one on reading the evidence, that the verdict is for the wrong party.

### HAYDEN, for defendant in error.

1. The partner, Hurst, had power and authority, in behalf of the partners, to undertake to do the work for which this suit was brought, for the kind of compensation paid him by Robinson, and it was not the duty of Robinson to obtain the express assent of the partner, Salmon, to the agreement so made, in order to render the same binding on them as partners, and that there-

fore his payment for the work done for him, under the agreement, discharged the debt sued for.

2. The evidence given by the defendant, to sustain his defence, was legal and competent, and therefore was rightly admitted by the court; and the only error committed by the court, in regard to the evidence of the defendant, was in rejecting the evidence contained in a written admission made by, and between said Salmon and Robinson, as to the fact of payment of the demand by Robinson, at the trial of the cause before justice Brown.

3. The circuit court decided correctly, in giving for defendant the instruction which was given for him, as also in refusing those which were rejected, as prayed for by plaintiffs.

**RYLAND, Judge,** delivered the opinion of the court.

The questions which appear to this court of most importance, are those arising from the instructions given, and the admission of the statement of the plaintiff, Hurst, that the account against the defendant, Robinson, had been fully settled. We shall pay no attention to the question, which the plaintiff in error endeavored to raise in the court below, about the custom of paying for blacksmith work in this country in money only; nor shall we trouble ourselves to notice the power, authority or right, of one partner in the blacksmith business to make agreements with the farmers for their custom, by contracting to take what is called in this case, "farm produce," for such blacksmith work as shall be done for them, in the shop of which he is partner. The question as to the admission of the statement of the plaintiff, Hurst, which he had made in writing, under oath, in the form of a deposition, is the most important one in this case. It seems, that the defendant, Robinson, had taken the deposition of the plaintiff, Hurst, one of the partners in the blacksmith business; which deposition had been suppressed by the court below. The defendant Robinson, then proposed to read this statement not as a deposition, but as a confession or admission of facts by one of the plaintiffs in this case. He proved the hand writing of Hurst, and offered to read his statement. This was objected to by the plaintiffs, but admitted by the court.

The principle involved in this question, has heretofore demanded the attention, and received the consideration of this court. In the case of *Armstrong et al vs. Fairchilds*, 8 vol. Mo. Rep. 627, this question came up, and after a review of many decisions, the court express their unwillingness to depart from the rule laid down in *Phillips, Starkie and Greenleaf*. It is thus stated by *Greenleaf*. "If the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one, is in general, evidence against all; they stand in this respect to each other, in relation, similar to that of existing co-partners."

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HURST & SALMON vs. ROBINSON:

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We still adhere to the views of this court given in that case, and consequently we see no error in the admission of this evidence in the court below.

The plaintiffs have no right to object to it, because the deposition had been suppressed. It was not read as a deposition but simply an admission in writing by one of the plaintiffs.

We have no fault to make with the action of the court in giving the second instruction prayed for by the defendant, Robinson; and consequently we are not disposed to find fault in the act of the court below, in refusing to give the first seven instructions prayed for by the plaintiffs, as these seven refused are but the converse, in some shape, to the one given for defendant. We will here insert the 2d. instruction, the only one given for the defendant Robinson. "That it was competent for the partner, Hurst, during the partnership, to make a special agreement with Robinson, to do the blacksmith work &c., mentioned in the accounts sued on, for Robinson, and to receive pay therefore in property other than money, and that if the court find from the evidence, that the partner, Hurst, during the partnership did, as the partner in the said blacksmith business, do and perform the work &c, for the said Robinson, for which suit is brought, and further find that the same was done &c., under said agreement, and paid for, by Robinson, according to said agreement, before the commencement of this suit, that then the plaintiffs cannot recover."

Here we find the whole merits of the case turn. The plaintiffs having been paid once, agreeable to the understanding when the work was brought to the shop to be performed, although this payment was made to one of them, and the work done by that one, are still seeking to recover payment again; and alleging as a reason for this conduct, that the payment of the account was in "farm produce," for the use of one of the plaintiffs, one of the firm. We are not anxious to seek out objections, technical defects, in order to reverse a judgment so consonant with right and justice as this one is.

The judgment of the court below will therefore be affirmed.

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ISBELL vs THE STATE.

**ISBELL vs. THE STATE.**

See Hays vs. the State, ante page

**HENDRICK, for the appellant :**

The court erred in refusing to instruct the jury as requested by the defendant; also in giving instructions which were objected to by defendant.

Where it is charged in the indictment, that the persons to whom the liquor is sold, are unknown to the grand jury, this averment amounts to an allegation that the persons to whom the liquor is sold, are persons whom the grand jury do not know; that they are strangers to the grand jury. Therefore, upon the trial, if it appear that the persons to whom the liquor was sold, are persons known to the grand jury, the variance is fatal and the defendant ought to be acquitted. A different doctrine would subject the defendant to be tried and convicted upon two indictments for the same offence; for it might well happen that one witness would testify to the grand jury of a selling of liquor to persons unknown to the witness, and of whom he could not testify, and upon that testimony, a bill like the present be found; and afterwards another witness would testify to the grand jury of the same case and give the names of the persons to whom the liquor was sold. In such cases, a man would, according to the doctrine that prevailed in the circuit court, be tried and punished in both cases and for one single act.

**STRINGFELLOW, Att'y. Gen'l. for the State :**

1. It was not necessary to aver to whom the liquor was sold, or that it was sold to persons unknown. State vs. Buford 11 Mo. Rep. In that case no such account was made.

2. It will hardly be insisted that a party charged with selling to a person unknown to the grand jury, is to be acquitted on its appearing that he also sold to some person known to them.

**Judge BIRCH, delivered the opinion of the court :**

As this case depends precisely upon the same question that was passed upon by this court during its recent term at St. Louis, the opinion in that case, (Hays vs. the State) need only be referred to as embodying sufficient reasons for affirming the judgment of the circuit court in the present one. It is accordingly affirmed.



HUDELMAYER vs. HUGHES.

## HUDELMAYER vs. HUGHES.

A instituted suit before a justice of the peace, against B, upon an account which he had credited by an amount which he owed B: he obtained judgment for the balance of his account. B took an appeal to the circuit court. In the mean time B instituted suit before another justice against A to recover the debt which the latter had credited upon his account. On the trial of this latter suit in the circuit court, (as well as in the justice's court,) A offered to prove by the record of the former suit and other evidence, by way of defence to the suit, that he had given B credit for the amount sued for in the former suit. This evidence the circuit court rejected on the ground that an appeal had been taken from the judgment of the justice, and was still pending and undetermined.

Held that the defence which A offered to make to the suit of B, was a good one; and that the evidence offered by him to prove the credit of B's account upon his own, should have been received.

## APPEAL FROM CLAY CIRCUIT COURT.

## STATEMENT OF THE CASE.

This was a suit brought by Hughes vs. the appellant, before a justice of the peace, on an account. The appellant filed an offset, in which he claimed to have credited Hughes with the amount of his account, in a suit which had been brought by appellant vs. Hughes, before a justice of the peace, and in which appellant had recovered judgment.

Judgment being rendered against the appellant, he appealed to the circuit court, and judgment being again against him, he appealed to this court.

On the trial in the circuit court, plaintiff having given evidence to establish his demand; defendant offered in evidence the record of the former suit, in which he was plaintiff, and Hughes was defendant, in which judgment was rendered against Hughes, and from which Hughes had appealed to the circuit court. The appeal was still pending in the circuit court. With this record, the defendant offered evidence to show, that at the trial of said suit, he had credited Hughes with the identical account sued on by Hughes, and that such account was allowed by the jury as a credit to Hughes.

All this evidence was excluded on the ground that the appeal was, still pending. This presents the only question in the record.

## ABELL &amp; STRINGFELLOW, for appellant:

The evidence offered by appellant, to shew that the account sued on, had been admitted and allowed as a credit on a judgment recovered by appellant against the appellee, was competent in defence, if not as an offset, as a former recovery, even though an appeal had been taken from such judgment, such appeal being undecided. The mere taking an appeal from the judgment of a justice, does not annul the judgment. It is true that under our statute, when the appeal is taken, and a trial had in the circuit court, such trial is *de novo*, and by proceeding on the appeal in the circuit court, the judgment of the justice is vacated and the appeal converted into an original suit. But until this is done, the judgment of a justice remains unchanged, and it is in the power of the appellant to dismiss his appeal and thus continue in force the judgment of the justice.

By the exclusion of the evidence in this case, it is in the power of Hughes to obtain the amount of his claim twice; once in his own suit; and again by dismissing his appeal, as a credit allowed by Hudelmeyer on his judgment.

RYLAND, Judge, delivered the opinion of the court :

From the above statement, the simple question before us, arises on the action of the court below, in rejecting the evidence offered by defendant Hudelmeyer, to show that the plaintiff Hughes, in this suit, had been allowed a part of his demand, in an action by Hudelmeyer against him, as a credit.

It seems that there were two suits between these parties, in one of which Hudelmeyer was plaintiff, and in the other Hughes was plaintiff. In the action in which Hudelmeyer was plaintiff, he had, in making out his account against Hughes, given to Hughes credit for some \$23 50. In this action Hudelmeyer obtained a judgment against Hughes, and Hughes appealed to the circuit court.

In the suit against Hudelmeyer, Hughes obtained judgment and Hudelmeyer appealed to the circuit court. This last mentioned appeal was brought to trial in the circuit court first, the other appeal still pending.

In this state of the case, the trial on the appeal in which Hudelmeyer was appellant, he offered to prove by the record of the proceedings in the suit, in which he obtained judgment against Hughes, and in which Hughes had appealed, that the sum of \$23 50, a part of Hughes' demand against him, had already been allowed to Hughes, as a credit in Hudelmeyer's suit against Hughes. Hudelmeyer proposed to prove the fact, by the record and by the testimony of the jury, who tried the suit. But the circuit court refused to let Hudelmeyer prove this, because Hughes had taken an appeal, and that appeal was still pending and undetermined.

When an appeal is taken from a justice of the peace, to the circuit court, a trial *de novo* is had. The merits of the case are again tried, and such judgment given as the court and jury deem just and right.

The appellant has it in his power to dismiss his appeal, in most cases.

Now, in this case before us, the refusal of the court below, to permit Hudelmeyer to show, by proof, that a part of Hughes' debt had already been allowed him in another action, might operate greatly to the injury of Hudelmeyer; but such proof cannot tend to injure Hughes. He may, in one event, obtain a credit for the amount, and also obtain a judgment at the same time, for it against Hudelmeyer; thus making Hudelmeyer pay the same twice. Upon the circuit court's refusal to let in this proof, Hughes obtained a judgment against Hudelmeyer for the identical demand for which he had already obtained a credit in Hudelmeyer's suit against him, and in which he had appealed, thus ob.

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 WEAVER to use of WEBB vs. McELHENON.
 

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taining a judgment in one suit and lessening the judgment against himself in another suit for the same demand. Now, after obtaining his judgment, let him dismiss his appeal, and we can see manifestly the injustice that would be done to Hudelmeyer.

On the other hand, had the court suffered Hudelmeyer to prove the facts which he proposed in this case, Hughes can in no event be injured. Let the proof reduce Hughes' debt against Hudelmeyer; then, on the trial of the other case, Hughes can show, that the amount has already been settled by the judgment of the court between them.

The difficulty arises in Hudelmeyer's giving credit on his account against Hughes; and in taking judgment for the balance after the jury has allowed the credit; thus making his judgment less by the amount of the credit given; then Hughes suing and obtaining full judgment notwithstanding he has been allowed the credit.

We think the court below committed error, in refusing to suffer Hudelmeyer to show the facts proposed by him in this case; and for this error, the judgment of the court below, must be reversed, and cause remanded for further proceedings not inconsistent with this opinion.

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### WEAVER, TO USE OF WEBB, vs. McELHENON.

Courts may take judicial notice of the abbreviations of a man's Christian name.

#### APPEAL FROM GREENE CIRCUIT COURT.

##### STATEMENT OF THE CASE.

This is an action of debt by petition and summons brought by the plaintiff upon a promissory note for \$160, and was signed by the defendant by the name of "Christy" or Christ McElhenon. The defendant filed a general demurrer to the petition, which was sustained by the circuit court, and the plaintiff brings this suit here by appeal.

**EDWARDS** for appellant.

The petition in said case is in the form prescribed by the statute, and the only objection taken, is that the petition states that Christopher McElhenon executed the note; and the note set out

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WEAVER, to use of WEBB, vs. McELHENON.

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is signed by "Christy" or "Christ" McElhenon. This, if an objection, cannot be reached by demurrer, but should be taken advantage of under a plea of abatement or misnomer. Under the patent plea of the last legislature, it should have been taken advantage of on the trial, on the ground of a variance between the name set out in the petition and that which was signed to the note offered in evidence. See 1 Chitty's Pleadings, page 485.

A petition in debt, under our statute, carries with it all necessary averments that could be made in the petition. See 6 Mo. Rep. page 163.

It is contended that this is not a misnomer of the defendant, but that it is a mere abbreviation of the name of the defendant, and such being the case, the court was bound to take judicial notice of the fact. See Perkins vs. Fenton, 3 Mo. Rep. 144.

Where two names have the same original derivation, or where one is an *abbreviation* or corruption of the other, but both are taken promiscuously, and according to common usage to be the same, though differing in sound, the use of one for the other is not a material misnomer. See Gordon vs. Holliday, 1 Wash. C. C. Rep. 285.

If this be the law in this case, the court should have overruled the demurrer, and permitted the plaintiff to show that the name by which this note was signed, was an abbreviation of the defendant's name. The doctrine in the case of Fenton vs. Perkins, above cited, also bears on this point. See also City Council vs. A. W. King, 4th McCord Rep. 487.

#### HENDRICK for appellee.

The circuit court did not err in its decision in this case. The action was manifestly brought wrong, and the court correctly sustained the demurrer.

#### RYLAND, Judge, delivered the opinion of the court.

From the above statement, the only point for the adjudication of this court, is the judgment of the circuit court in sustaining the defendant's demurrer to the plaintiff's petition.

We are of the opinion that the circuit court committed error in sustaining the defendant's demurrer. The only objection on the record appears to be, the abbreviation of the Christian name of McElhenon.

The petition sets forth his full name of "Christopher," and the note is signed by him in the abbreviated name thus: "Christy" or Christ. We do not consider this abbreviation, and the manner it has been set forth in the petition of the plaintiff, as an objection liable to be reached by demurrer.

If it was a variance even, the same ought to have been taken advantage of on the trial, by motion to exclude the note as evidence on account of such variance, or by craving oyer, and spreading out the instrument and then demurring. See Summers et al. vs. Tice, 1 Mo. Rep. 349.

We do not consider this a material or fatal variance. It is, in our opinion, simply an abbreviation, and according to the decisions of this court heretofore made in the cases of Birch & Hayden vs. Rogers, 3rd

## WILKERSON vs. THE STATE.

Mo. Rep. 227, and Fenton vs. Perkins, 3rd Mo. Rep. 144, "the abbreviations of a man's given name are so common, that, without any violence to the laws of our land, the courts may take judicial notice of them."

The case of Gordon vs. Holliday, 1 Wash. C. C. Rep. 285, cited by the appellant's counsel in his brief, fully sustains the views of this court as to the abbreviation of names.

We are therefore of the opinion, that the court below erred in giving judgment on the demurrer for the defendant below.

The judgment of the circuit court is therefore reversed, and this case is remanded to be further proceeded in according to the opinion hereby given.

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WILKERSON vs. THE STATE.

If two names have the same original derivation, and both are taken according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer.

## ERROR TO GREENE CIRCUIT COURT.

## STATEMENT OF THE CASE.

The only question presented in this case, is whether the circuit court did right in refusing to admit the defendant's plea in abatement to be filed; and in not allowing an issue to be made upon that plea.

## ROBARDS, Attorney General, for the State.

The action of the circuit court, in rejecting the plea in abatement, was right.

1. A defendant cannot take advantage of a mistake in his *surname* by a plea in abatement. Upon this point, see 2 Hawkins pleas, Crown, page 328; 7 Bacon's Abridgment, p. 8.

2. The defendant, in his plea, acknowledges himself to be the person indicted; and upon this ground the plea ought to have been rejected. 8 Tenn. Rep. 515; 3 do. 185; 5 do. 487; 1 Chitty Crim. Law, 448.

3. The plea does not profess to set forth the defendant's *true* name, but only an acquired name. 1 Chitty Crim. Law, 447.

4. If two names are, in original derivation, the same, and are taken promiscuously in common use, though they do differ in sound, yet there is no variance. Chitty's Genl. Practice, 3 vol. page 171. In the case there mentioned, Reynall and Reynolds are considered the same sound. See also 16 East. 110, 7 Mo. Rep. 142; Hutson and Hudson are considered the same. 2 Cain Rep. 362; 1 Wash C. C. R. 289; 2 do. 202; 2 New Hamp. Rep. 557.

RYLAND, Judge, delivered the opinion of the court.

This case presents no other question before us than the act of the court below, in treating the defendant's plea in abatement as a nullity.

We are satisfied that the plea is not a good one, and that the matter set forth in the plea is not susceptible of being properly plead in abatement; and we are not disposed to complain of the court below in thus treating it.

The authority in 2 Hawkins' Pleas of the Crown, cited by the Attorney General, sustains his position; but without saying any thing to sanction that authority, we are satisfied that this plea has no merits. "Wilkerson" or "Wilkinson," like the names of "Robinson" or "Robertson," or "Roberson," "Hudson," or "Hutson," so much alike in sound, so nearly the same in original derivation, and so promiscuously taken in common use, that the variance in orthography may be considered so nearly nothing, as that the law will not notice it. "*De minimus non curat lex.*"

The authority cited from 1 Washington's Circuit Court Reports, (U. S.) will shed much light upon this subject to those among us, who yet seem so fond of technicalities, that have met with no favor in courts of justice for more than a century.

In this case the bill of exceptions shows, that when the case was called for trial, the defendant announced himself ready. A jury was sworn to try the case, and by their verdict found the defendant guilty of the offence of gaming, assessed his punishment to ten dollars, and then the defendant complains that his plea in abatement had not been tried. We are satisfied with the action of the court, in paying no attention to his plea; in treating it as a mere nullity.

He has had the advantage of a jury to try his guilt or innocence. He has no cause to complain.

Let the judgment be affirmed.



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REED & REED vs. HARRINGTON.

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## REED &amp; REED vs. HARRINGTON.

Where no part of the evidence given on the trial of a cause is excepted to, and no instructions are asked, the supreme court will not disturb a verdict found by the court sitting as a jury, if the evidence warrants it.

## ERROR TO JACKSON CIRCUIT COURT.

## STATEMENT OF THE CASE.

This was an action by petition in debt founded upon a bond, brought by Harrington against James and John Reed, to the September term of the Jackson circuit court, A. D. 1847.

The defendants below pleaded the general issue, and filed their petition for discovery, charging usury and part payment of the bond. The plaintiff below answered their petition, denying all the allegations in the bill, and the facts were submitted to the court. The only evidence introduced was the bond and the answer to the petition for discovery. No instructions were asked on either side, and the court found for plaintiff below the sum of \$158 debt and \$132 27 interest. The defendant s below moved for a new trial; the motion was overruled, and the defendants excepted, and have brought the case to this court by writ of error.

## HAYDEN &amp; ENGLISH for plaintiffs in error.

1. The court erred in overruling the motion for a new trial.
2. The judgment is not a legal and sufficient judgment.

*First.* That the court erred in overruling the motion for a new trial.

Because the verdict of the court, sitting as a jury, was against the evidence; and the evidence did not warrant the finding of the court.

*Second.* That the judgment is not a legal and sufficient judgment.

Because the judgment does not specify or contain the amount for which the judgment is rendered.

## HOVEY for defendant in error.

The court below committed no error in overruling the motion for a new trial, because the evidence warranted the finding, not only, but warranted a larger verdict than was found.

## RYLAND, Judge, delivered the opinion of the court.

The evidence in this case was submitted to the court below sitting as a jury. There was no exception taken to any evidence. No instructions asked for as to the law governing the case. All the evidence offered, consisted of the bond given by plaintiffs in error to the defendant in error, and the bill of discovery filed by plaintiffs in error and the defendant's answer thereto.

## BARADA &amp; BARADA vs. THE STATE.

We cannot see any cause the plaintiffs in error have to complain of the action of the court below. That court was fully authorised, from the evidence before it, to find the facts, as it did, in favor of plaintiff below.

There is no error appearing to us on the record requiring our interposition; no legal principle requiring our opinion; no particular fact complained of as error.

Let the judgment be affirmed.

## BARADA &amp; BARADA vs. THE STATE.

The defendants were indicted jointly, for permitting gaming in a house occupied by them.

The jury assessed a fine of fifty dollars against the two. A joint judgment was rendered against them for the amount of the verdict.

Held that if any error was committed by the court in entering a joint judgment against the defendants, it was in their favor, and they have no right to complain.

## APPEAL FROM BUCHANAN CIRCUIT COURT.

## STATEMENT OF THE CASE.

This is an indictment against the defendants, and one other person jointly, for permitting gaming in a building of which they had the possession and control. The defendants were found guilty by a jury, and a joint fine of fifty dollars was assessed against them.

## EDWARDS and JONES, for appellants.

1. The verdict and judgment of the court below, are joint against both defendants, when they should have been several and separate against each defendant. (10 Mo. Rep. 440, State vs. Gay et al.)

2. The offence in the indictment, must be proved as laid. (Archibold crim. Pl. 98—9.)

The evidence does not show that a pack of playing cards was even set up, or used in any building by any person, for the purpose of playing games of chance, for money, or property; or that any money or property, was ever bet on any game of chance at any time, by any person, or that any game was ever played in a building under the control or in possession of said defendants, or either of them; therefore the verdict and judgment of the court below, are contrary to law and evidence.

3. The witnesses speak of having seen gaming or gambling in a building, without stating the facts and circumstances which constitute an act of gaming, and its kind. The word gaming

## BARADA &amp; BARADA vs. THE STATE.

has an extensive legal meaning, and includes all the various kinds of games known to the law; such as E. O. Rolette, Chuckerluck, Cribbage, Faro bank, Horse racing, &c., &c. The indictment charges, that defendants permitted a particular kind of device to be set up and used, yet the court and jury were not informed, by the witnesses, whether the kind of device, mentioned in the indictment, was used or not. To permit the judgment of the court below, to stand, would be equivalent to saying, that a man might be indicted for stealing a horse, and that if a witness was to state on the trial, that he had committed larceny; that the evidence would be sufficient to warrant a conviction, without the witness stating the facts and circumstances necessary to show that an act of larceny had been committed, and its kind.

4. To constitute an act of gaming, there must be persons to play, and they must play some game of chance for money, or property, and these are things that must be proved.

5. The evidence clearly shows, that neither of said defendants had possession or control of the building spoken of.

## ROBARDS, Atty. Genl. for the State.

1. The act of permitting games of chance to be played in a building possessed by several persons, or under their control, is a joint offence for which they may be jointly indicted. 10 Mo. Rep. 441.

2. Though this is a joint verdict against the defendants, it should stand: 1st. Because no motion was made to set it aside, because it was a joint verdict. 2nd. Because the fine assessed against both, is the least that could, by law, be assessed against each, and is more favorable to them than the law ever contemplated. Mo. Digest 906; 8 Mo. Rep. 64—128.

3. There was no objection made to the giving or refusing of instructions, nor to the admission or rejection of evidence, and this court cannot look into such matters: neither can a motion for a new trial bring these questions before the court. 10 Mo. Rep. 515.

4. The evidence warrants the finding of the jury, and this court will not interfere with the verdicts of juries except in very palpable cases. 10 Mo. Rep. 676, 9 Mo. Rep. 50.

5. If there was any error committed in the court below, it was because the verdict was joint. This error, if any, is in favor of the defendants, and cannot be a source of complaint by them in this court. 7 Mo. Rep. 569, 9 Mo. Rep. 636.

## RYLAND, Judge, delivered the opinion of the court:

This was an indictment against the defendants, Edmund Barada, Isadore Barada & Alexander Constant, for keeping a gaming house, &c., found by the grand jury in Buchanan county, at the March term 1848, of the circuit court for said county.

The defendants were arrested, and at the March term, 1849, were tried upon the indictment, to which they had plead not guilty.

The jury found the defendants, Edmund and Isadore Barada, guilty, and the defendant, Constant, not guilty. The jury assessed the fine of fifty dollars against the two Baradas. They afterwards moved for a new trial and in arrest of judgment. The motions were overruled, and the defendants, Baradas, then bring the case to this court.

## BARADA &amp; BARADA vs. THE STATE.

There were no exceptions taken to any evidence given, nor any instructions given. The principal cause of objection is in the verdict of the jury, and the judgment of the court.

The defendants contend, that the verdict and judgment should have been several; that is, finding each one of these two defendants guilty, and assessing a fine separately against each one; and judgment should have been rendered against each one for a separate fine.

The matter of the judgment being joint against both defendants; is the only one which demands our attention. The case of the State of Missouri vs. John H. Gay, and others, is relied on and cited by the Atty. Gen'l. as well as the counsel for the defendants, Baradas. This case was an indictment against Gay, et al. for keeping a ferry without license. The indictment was said to be a good form, but it was demurred to because the offence was charged to have been committed jointly by Gay and the others. The court below sustained the demurrer, and this court reversed the judgment, sustaining the demurrer, alleging that if the offence consist of any joint act, which is criminal in itself, without regard to any particular personal default in the defendant, such as the joint keeping of a gaming house, &c.; in such cases the indictment may either charge the defendants jointly and severally, or may charge them jointly only. This court then, after deciding the question before it, goes on to say, that "when several are joined in one indictment, a joint award of the fine against them is erroneous;" and it is upon this latter clause of the opinion in the above case of the State vs. Gay et al. that the defendants rely for a reversal.

Without giving any sanction to the doctrine in the latter clause of that opinion, (as I consider that question was not before the court,) I will merely, for the benefit of the defendants, in this prosecution, state, that the judgment in this case is for the minimum punishment; the fine being not less than fifty dollars, nor more than five hundred dollars. The judgment that these defendants then pay fifty dollars as the fine, instead of each one to pay that sum, cannot be said to be to the injury of them or to their prejudice. The error of the court below, if there be any, was clearly in their favor, and it is with such ill grace that they complain of it here, that this court is disposed to pay little attention thereto.

Let the judgment, therefore, be affirmed.

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KING vs. HUNT.

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**KING vs. HUNT.**

Where a person executes a note jointly with another, if the payee and other joint promisor alter the time of its maturity, without his knowledge or consent, it is void as to him. But if after such alteration is made, he assents to it, he adopts it as altered, and it is binding upon him.

**APPEAL FROM DADE CIRCUIT COURT.****STATEMENT OF THE CASE.**

Hunt sued one Mathias Frazier and King, before a justice of the peace in Dade county, on a promissory note given by Frazier as principal, and King as security. The note was for fifty five dollars, and was due the first of March, 1845. It appeared from the face of the note, and was so proven on the trial, that the note had been altered by erasing the word "May," and inserting "March." The summons issued by the justice was served on King. Frazier was not found, nor was any disposition of the case ever made as to him. On the trial before the justice Hunt obtained judgment against King, and King appealed to the circuit court, where Hunt again obtained judgment, and King brings this case here by appeal. King filed a motion for a new trial, and to set aside the verdict; both of which were overruled by the court, and exceptions taken.

It appears from the evidence preserved in the bill of exceptions, that Frazier applied to Hunt to buy a wagon of him. Hunt agreed to sell it to him if he would give King as security. Frazier went to King, who signed his note which was to become due on the first of May following. Hunt refused to accept the note, stating, that it was to have been made payable the first of March. Frazier told him to alter the note, and he would stand between Hunt and King. Hunt then erased the word May, and inserted March. King was not present, and knew nothing of the alteration at the time it was made. On the trial in the circuit court, King denied the execution of the note on oath, and the plaintiff then introduced evidence for the purpose of showing, that after said note had been altered by Hunt, as aforesaid, King consented to the alteration, and adopted the note thus altered as his own.

**PRICE and EDWARDS for appellant.**

1. The note was altered by Hunt after it was signed by King, without his knowledge or consent, and he was thereby released from the payment of the note.
2. The court erred in permitting the note to be read in evidence to the jury. The fact that the note had been altered was admitted. To make King liable, afterwards, he must have consented thereto. The evidence does not show that King ever consented to the alteration, much less after he knew the note had been altered. No witness states that King ever said a word or knew aught about the alteration of the note when he spoke about paying it.
3. The first four instructions, given by the court, on the part of the plaintiff, are given without any evidence upon which to base them; thereby calculated to mislead the jury and should not have been given.

**ABELL and STRINGFELLOW for appellees.**

The only question in this case is, as to the assent of King to the alteration in the date of the note. The law as laid down by the court in the instructions, and which were not objected to,

presented this question to the jury too favorably for the defendant below. The evidence was ample to show King's assent to the alteration—to prove that after he had ascertained that the alteration had been made, he repeatedly promised to pay the note.

RYLAND, Judge, delivered the opinion of the court:

The only question in this case, which calls for the attention of this court, is the one involving the assent of the appellant, King, to the alteration of the note, as to the time of its maturity; and his adopting it thus altered; and his promising to pay it.

After the testimony was closed, the court gave several instructions, for the plaintiff, as well as for the defendant. These instructions place the whole case, fairly and consistently with the rules of law which must govern it before the jury.

We will insert some of the instructions given for defendant, that it may be seen, that the point was before the jury.

"The court instructs the jury, that if they believe from the evidence, that the note sued upon has been changed, without the consent of the defendant, and to the injury of the defendant, then they must find for the defendant."

"Further, if the note was altered, without the consent of King, but by the consent of Frazier, one of the defendants or obligors, but not sued in this case, that King is not bound, and therefore they must find for the defendant King."

"The court instructs the jury, that unless they believe from the evidence, that King consented to the alteration of the note by Hunt, and adopted his act in altering said note, that the note is not King's, and therefore they must find for the defendant."

"That any act or any thing that King said or did before he knew that the note had been altered, was not binding on him."

The instructions given by the court for the plaintiff below, were not inconsistent with those for the defendant.

The jury found for the plaintiff and the defendant, after a fruitless motion for a new trial, appeals to this court.

We find no fault with the action of the court below, and according to the long established practice of this court, we will not disturb the verdict of a jury found upon contradictory evidence. Where there is testimony which might warrant a finding for either party, and there are no incorrect or illegal instructions given, we will let the verdict stand. The question before us, does not involve our satisfaction or satisfac-



## HENDERSON vs. SKINNER.

tion with the verdict, nor whether we, sitting as jurors, would have found such verdict or not. We will look at the evidence, and if it will warrant such finding; if there be evidence that will support such finding, be it so; we will not reverse, unless satisfied that manifest injustice has been done.

We think the jury in this case, might well have found as they did, and consequently, that the court below did not err in overruling the motion for a new trial.

Let the judgment therefore be affirmed.

## HENDERSON vs. SKINNER.

1. Plaintiff furnished defendant with five hundred dollars, with which, by agreement, he was to enter certain lands for plaintiff. Defendant used only part of the money in entering the lands, and appropriated the balance to his own use. Held, that the plaintiff may recover under the common counts in assumpsit, the amount not so applied, together with six per cent interest thereon, from the time it ought to have been so applied.
2. Where a person sells personal property to another, and after receiving the pay for it, converts the property to his own use, he is liable, under the common counts in assumpsit, to the purchaser for the price paid and interest.

## APPEAL FROM PLATTE CIRCUIT COURT.

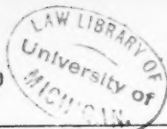
## STATEMENT OF THE CASE.

The state of the case from its commencement to the first trial, with the pleadings and judgment, appear in the 10th vol. Mo. Rep. p. 203, and the directions given on the points then before the supreme court, to regulate the future action of the circuit court, where it was remanded.

After a mistrial, the jury not agreeing, at the March term, 1849, a trial came on at the September term, 1849, in which the jury gave a verdict for the appellee for one hundred and fifty dollars in damages.

A new trial was asked for, after setting the judgment aside, which was overruled. A motion in arrest of judgment was made by the defendant, and heard and overruled. Exceptions were taken to all these matters, and the defendant appealed to this court.

In the trial of the cause, the plaintiff gave evidence of an agreement between him and defendant of the 16th of March, 1842, by which Henderson agreed to lease to plaintiff for 99



years, the S. E. qr. of sec. 34, town. 54, range 34, with the proviso, that he could prove up pre-emption on it under the act of 1838 or 1840, without hindering him from proving up under 1841; and if he cannot, he warrants against older claims to it until the government sale of it, at public sale. Henderson also covenants to assign to him Barnabas Gable's lease of the S. W. qr. of same section, range and township; also all his interest (being the north half) of the N. W. qr. of sec. 35 in same township and range, and Henderson was to pay him the rent in wheat he was to get of Bywaters, and two bee stands; also 4950 new rails, and all rails, boards and timbers; also 4000 shingles, cut of timber furnished on the place, with present possession of the houses and lots, with small exceptions of houses and spring lot until first of April thereafter.

Skinner, as consideration, promises \$1000 on taking possession; \$1000 on full possession, and \$500 on 1st July thereafter; and \$500 for entering the lands, at the time of payment, with a penalty on each of \$5000 for non-performance.

By mutual act and consent of both parties, the original of this agreement was taken up from one Bywaters, with whom it had been left and burnt, the plaintiff alleging that information from the land office, induced him to believe that his title to the land he had gotten of defendant, would be endangered if the obligation was left in force.

The plaintiff then proved payment on the contract, as follows; 1st. March 21, 1842, \$1000; 2nd. April 2nd, 1842, \$500; 3rd. August 11, 1842, \$600; 4th. Sept. 8th, 1842, \$400; 5th. June 22, 1843, (to enter land) \$202; 6th. Aug. 5th, 1843, (bal. of entry money) \$298, amounting in all to \$3000.

To the reading of the bond and receipts, objection was made by the defendant, which was overruled and the papers read.

It was proved that the sum of \$202 was paid in the land office, for the entry of the quarter in Gable's name, before the destruction of the contract.

The defendant proved that a patent from the U. States had issued to plaintiff, assignee of defendant, of date 1st of April, 1846, for S. E. qr. of sec. 34, town. 54, range 34, of 160 acres. He also proved the execution of a deed, of 1st February, 1844, of Barnabas Gable and wife to plaintiff, for the S. W. qr. of sec. 34, range 34, town. 54 of 160 acres. This deed was made after the destruction of the contract. A duplicate receipt was read for the payment for the same land by Gable, given by the Receiver of Public Lands. Possession of this land was proven in plaintiff, as also that tract in the patent, before and ever since, after the date of the Receiver's receipt, defendant never having been in possession since the date of the contract. The deed of Gable was made at defendant's request, who had long before paid Gable for the lease of 99 years on it. It was proven that the plaintiff consulted his counsel in 1843, showing the original contract, who advised him that the contract was not binding on defendant. That defendant declined entering 80 acres under pre-emption laws of 1838 and 1840, under belief that it would endanger the entry of his own pre-emption of land where he lived, under the act of 1841; but upon his proposition to plaintiff to pay him \$98, the whole sum for entry money then due upon the contract, he would risk his own pre-emption, and make the entry for Skinner's benefit of the 80 acres, the north half of the quarter in the contract mentioned. Skinner contended that that sum was only to be paid to make the entry of the Ashworth 80 acres, but in consideration of plaintiff being greatly desirous to secure the lands, which he had much improved, the risk of enforcing his contract, and the inability of the defendant to make good the loss of the money advanced, under the advice of his counsel, he gave the \$98 for the defendant's entry of the quarter. It was made, and the certificate assigned to plaintiff. This the counsel thought was a final settlement of the contract. Afterwards, the same fall, a stranger entered upon the land, and set up claim to contest the legality of the contract and the titles acquired under it. By the advice of counsel, the plaintiff and defendant destroyed the contract for the purpose of cancelling it.

It was proven that Jackson Henderson had a pre-emption claim to the Ashworth quarter. His claim was to the south half, not the north. He gave up the land to the State Commissioner,

## HENDERSON vs. SKINNER.

Leonard, for selection for State purposes, but offered plaintiff to enter the whole quarter, the north half for plaintiff, if he would advance him \$100 for his entry of the south half. He refused. Afterwards, one Jack entered the whole quarter. Plaintiff took wheat on the land; hauled rails off the north half of the quarter; affirmed they were defendant's rails; took logs and timber prepared by defendant, and went into the possession of the two quarters immediately after the contract, and has held them ever since. It was proved that Ashworth sold his quarter to defendant. There were rails there to make partition fence. Plaintiff acquired them when Ashworth sold his land to defendant, and he to plaintiff, and they were put up. Possession was given plaintiff under contract with the defendant of the two quarters, and he has held ever since and now resides on it.

The court gave, of its own accord, three instructions, to which the defendant excepted and objected.

The defendant asked five instructions, all of which were refused except the fourth, and exceptions taken.

**HAYDEN and TODD for appellants.**

1. The plaintiff cannot recover in general indebitatus assumpsit; hence the 1st, 2nd and 3rd of defendant's instructions ought to have been given. 4 Philips Ev. 119, 120.

2. The plaintiff cannot recover. It is a forbidden contract by the pre-emption laws of the United States, and has in whole or in part been executed. 9 Mo. Rep. 259; 10 Mo. Rep. 205; 15 Wend. 412; 6 Cowen 431.

3. The money (i. e. the \$98) was paid in full settlement of the contract, voluntarily, with full knowledge of the rights of the parties and of the facts, and cannot be recovered back. 4 John. R. 240; 2 Richardson's Rep. 317; 3 Marsh, 338.

**RYLAND, Judge, delivered the opinion of the court :**

This case was brought up to this court before, by Skinner, who was non-suited, and the facts and points then decided, with directions for future proceedings, may be seen as reported in 10 Missouri Rep. 205.

We adhere to the decision then made, and adopting it for our government herein, shall proceed to notice only the points now arising from the instructions given by the circuit court. From these instructions, the case turned alone upon two grounds.

1st. instruction. "The court instructs the jury, that if plaintiff furnished defendant five hundred dollars, to be applied by defendant to the entry of land, for the benefit of plaintiff, and defendant so applied only four hundred and odd dollars, then plaintiff is entitled to recover what was not so applied, together with interest thereon at six per cent, from the time it ought to have been so applied.

2nd. instruction. "If the plaintiff paid defendant for rails sold by defendant to plaintiff, and defendant afterwards made use of such rails for his own benefit, he is liable to account to plaintiff therefor, and if he has not heretofore so accounted, plaintiff is entitled to recover in this action.

## HENDERSON vs. SKINNER.

3d. instruction. "If the plaintiff fails to make out a case, upon the foregoing instructions, they will find for the defendant.

The jury found for the plaintiff for one hundred and fifty dollars damages.

From the facts in this case it appears, that Skinner, the plaintiff, and Henderson entered into a contract for two quarter sections and a half quarter section of land, making in all five eighty acre tracts. That Skinner paid a large amount of money to Henderson, and was, when the lands could be paid for at the land office, to advance the purchase money to Henderson, in order to enable him to pay for the lands; also bought the quantity of rails on the land, at the time from Henderson.

It appears that after Skinner got possession of a part of the lands contracted for, that is four of the five 80 acre tracts, there was some fear entertained that he might lose the lands and his improvements too, as the contract between him and Henderson has an endeavor on their part to evade the pre-emption laws of the United States. These persons, Skinner and Henderson, were told that this contract was not a valid one. They then, mutually fearing the consequences of their illegal agreement, agreed to burn the same. It was taken out of the depository's possession and burnt. Henderson never bought or paid for the other 80 acre tract; left Skinner with the four eighty's, and from the evidence, it appears, he used for his own benefit, rails which he had sold to Skinner. Three thousand dollars, including the money to enter lands with, were the consideration passing from Skinner to Henderson.

It seemed to be the object of the plaintiff, by the instructions which he prayed the court to give the jury, to recover of the defendant in this action, the pro rata consideration of the 80 acre tract, which Henderson, by the agreement, sold to the plaintiff, but which, although the money to purchase it, at the land office, had been advanced by plaintiff to him, he yet failed to purchase for plaintiff. That is, the one fifth part of the three thousand dollars, equal to six hundred dollars, and to recover the interest of the same at six per cent.

Defendant, by the instructions which he asked the court to give, contended against the plaintiff's right to recover in the present form of action. He relied on the contract being executed on the part of the plaintiff, and although he had only managed to execute it on his part so as to convey the two quarter sections, or the four of the five eighty's, still he held that the burning of the original agreement, did not authorize the plaintiff to recover of him in this form of action.

## HENDERSON vs. SKINNER

The instructions asked by the defendant, and which the court refused to give, we consider were properly refused. The 4th instruction for the defendant, was given, which is as follows: "If the jury believe from the testimony, that a question arose at the land office, as to the payment of the \$98 or \$100, between plaintiff and defendant; the defendant claiming the payment of that sum under the agreement, and the plaintiff contending that he ought not to pay it; and the plaintiff paid it with a full knowledge of the facts, and the contract was otherwise executed on the part of the defendant, then plaintiff cannot recover for the \$98 or \$100, as the amount may be; they will find for the defendant."

This instruction gave the benefit of the agreement so far as the payment of the \$98 by plaintiff, to the defendant; if he, defendant, had performed his part of the agreement. We will not complain of this instruction.

From a full view of the whole case, as appears before us upon the bill of exceptions, we find no grounds for any just cause of complaint by the defendant Henderson.

The instructions given to the jury by the court, of its own motion, only make Henderson liable to plaintiff, if the jury shall believe he had received five hundred dollars to enter the lands with for plaintiff, and had only entered four hundred and odd dollars worth, then he is liable for the difference with six per cent. interest; and if he had sold rails to plaintiff, been paid for them, and afterwards used and converted the rails to his own use.

We find no reason for the defendant to object to these instructions. They place the case very favorably for him before the jury. We are not so sure, but that, under the principles laid down in this very case, when before this court heretofore, the circuit court might have suffered very properly, a recovery against the defendant, for a failure to refund the amount, pro rata, of the 80 acre tract, which defendant originally contracted with plaintiff to convey to him.

At all events, we feel no disposition to distrust this finding of the jury. The defendant has no right to complain. From the small amount of the verdict, the jury may have only designed to make defendant pay for the rails, which he converted to his own use; saying to the witnesses, *that they were the plaintiff's rails, but he reckoned the plaintiff did not know it*; a poor excuse to satisfy any honest man's conscience.

Let the judgment be affirmed.

Judge BIRCH, having been of counsel for the court below, did not sit in this case.

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McCLURE vs. SHROYER.

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**McCLURE vs. SHROYER.**

1. Arbitrators have power, under the statute, to award costs against either party, unless they be expressly prohibited from so doing; by the terms of the submission.
2. Plaintiff and defendant on the 25th day of September, 1847, entered into an article to submit certain matters of controversy between them to arbitrators. One of the terms of the article, was, that the award should be made and published within ten days from the date of the article. The award was made, written out, signed and witnessed on the 4th day of October following. Held to be a sufficient publication of the award within the time.
3. The arbitrators, before whom the plaintiff and defendant had submitted their matters of dispute, allowed plaintiff a demand which the defendant owed him as *administrator*. Upon the trial before the arbitrators, the defendant did not object to the *nature* of the claim, but only to the amount of it. Held not to be a sufficient cause to vacate the award.

**APPEAL FROM SALINE CIRCUIT COURT.****STATEMENT OF THE CASE.**

On the 11th, September, 1847, Shroyer and McClure having open and unsettled accounts respectively against each other, agreed in writing, under their hands and seals, to submit such matters of difference to the arbitration of three persons, upon whose award a judgment of the circuit court should be rendered.

By a supplemental agreement, signed and sealed the 25th of September 1847. it was provided that a particular account of Shroyer against McClure should not be included in the submission, and that the arbitrators should make and publish their award within ten days from that date. William A. Wilson was selected as an arbitrator by Shroyer, and John S. Long by McClure, and these two, in pursuance of the articles of submission, selected Richard W. Bowen.

The arbitrators, thus selected, made an affidavit as is provided by the statute in such cases, and on the 25th September '47, commenced an investigation of the matters submitted to them; and in the presence of the parties and their attorneys, proceeded to hear their allegations and proof, until the 4th day of October, 1847, when Wilson & Bowen, a majority of the arbitrators, made their award that McClure was indebted to Shroyer, \$119 44, and that he should pay \$15, for the costs of the arbitration for their services, which was signed by them, and attested by a subscribing witness. On the same day, they delivered their award to Shroyer. On the next day, a notice accompanying the award, was prepared by Shroyer's attorney and addressed to McClure, that a motion, at the succeeding term of the circuit court, would be made to confirm the award.

This motion was served on McClure, by the sheriff of the county, on the 6th October; and also a copy of the award. On the 13th October, McClure notified Shroyer that he would move the circuit court to vacate the award. At the November term, 1847, of the Saline circuit court, Shroyer filed a motion to confirm the award, and McClure filed a motion to vacate the same, which were continued until the spring term following, when the motions were again continued at the instance of McClure. At the November term 1848, the several motions were heard and determined; the motion to vacate was overruled and the award was confirmed. Witnesses were introduced upon the hearing of the motions, but no questions of law were presented before the court, by instructions by either party, and no motion for a new trial was made. McClure seeks to reverse the judgment of the circuit court, and has brought the case here by appeal.



## McCLURE vs. SHROYER.

**ENGLISH, for appellant:**

1st. The court erred in overruling the motion to vacate the award, because,

*First*, The arbitrators permitted the appellee, several days after the matters had been submitted to them, to file, in addition to the account already before them, other accounts against the appellant, which was not in accordance with the terms of the submission; "that the parties should have the privilege of proving and disproving any and every matter in the same manner and under the same circumstances that they would in any court of record."

*Second*, Because the arbitrators permitted the appellee to file against the appellant an account due to the appellee in his representative character, as administrator of one McNutt, which was not within the terms of the submission, and they consequently exceeded their powers.

*Third*, Because the arbitrators exceeded their power in awarding costs against the appellant, not warranted by the terms of the submission. 8 Mass. Rep. 399.

*Fourth*, Because the award made, is not mutual. It awards money to be paid by the appellant, but does not say what for; whether in final settlement of accounts between the parties or not; neither does it provide for receipts or release from appellee to appellant, but is altogether one sided.

2. Because the court having erred in overruling the motion to vacate, erred in sustaining the motion to affirm the award.

3. Because the court erred, consequently, in giving judgment on the award against the appellant, and because the judgment given, is not such as the law prescribes. Rev. Code '45, page 124, sec. 18.

In a court of record, a party is apprised at the outset of the demand against him. He is not liable to be surprised at any stage of the trial, by the introduction of new accounts against him; so that, when the arbitrators in this case, permitted the appellees to introduce claims, several days after the matters had been submitted to them, they deprived the appellant of the privilege of disproving them, under the same circumstances that he would in a court of record, as was expressly provided by the terms of submission.

The other objections require no argument; they are apparent on the face of the submission and award. The bill of exceptions shows, that the appellee was permitted to introduce accounts due to him in a representative character.

**RICHMOND, for appellee:**

1. This court has frequently decided, that the judgment of the circuit court will not be disturbed, unless it has been called on to decide some question of law, and in this case, no question of law was presented before the circuit court, either by instructions or by a motion for a new trial. *Von Phul vs. City of St. Louis*, 9 vol. Mo. Rep. 49; *Fugate & Kelly vs. Muir*, 9 vol. Mo. Rep. 355; *Penn vs. Lewis*, 12 vol. Mo. Rep. 161; 8 vol. Mo. Rep. 709.

2. The judgment of the circuit court will not be reversed, unless a motion for a new trial was made and overruled. *Benoist & Hackney vs. Powell & Wilson*, 7 vol. Mo. Rep. 224, *Watson vs. Pierce & Pierce*, 11 vol. Mo. Rep. 358; *United States vs. Gamble & Bates*, 10 Mo. Rep. 459; *Fresh vs. Bank of Mo.* 10 Mo. Rep. 515; *Rhodes vs. White*, 11 vol. Mo. Rep. 623; *Lysle vs. White*, 11 vol. Mo. Rep. 624.

3. It is the policy of the law to encourage the settlement of controversies by domestic tribunals, appointed by the parties; and the courts ought not to distrust awards upon technical objections, but should seek to give effect to them when there is a substantial compliance with the statute and the articles of submission.

4. It was no ground to vacate the award, that the arbitrators adjudged costs against McClure. The statute gave them the right to do so. Rev. Code 1845, Title "Arbitration," sec.

16. Independent of the statute and the submission, the power was necessarily incident to

## McCLURE vs. SHROYER.

the authority of the arbitrators. *Strang vs. Ferguson*, 14 John. R. 160; *Cox vs. Joggin*, 2 Cowen 650; *Nichols vs. Rensselaer Ins. Co.* 22 Wend, 125; *Hewitt vs. Trueman*, 16 S. and Rawl 145.

5. The submission provided that the award "should be made and published within ten days" from that date, (Sept. 25th.) On the 4th of October, (th 9th day) a majority of the arbitrators signed this award, and called a witness who subscribed his name to the same, as an attesting witness. This was "making and publishing the award" within the time appointed. The construction that would require notice of the award to be given to McClure, would furnish him with the power of defeating the award, by keeping out of the way to avoid notice.

RYLAND, Judge, delivered the opinion of the court.

It will appear from the above statement, that this was an arbitration between appellant and appellee of unsettled accounts existing between them. Motions were made by each party, after the award of the arbitrators was published, one to have the judgment of the circuit court affirming, and the other vacating the award. Upon the trial of these motions, after hearing evidence, the circuit court overruled McClure's motion to vacate the award, and sustained Shroyer's motion to make the award a judgment against McClure in the circuit court.

McClure appealed from this judgment to the supreme court, and mainly relies upon the following grounds to reverse the judgment.

1st. The arbitrators awarded costs against him, when they had no power by the terms of the submission.

2nd. The arbitrators did not make and publish their award within the ten days, the time limited by the terms of the submission.

3rd. The arbitrators permitted Shroyer to exhibit an account due him as administrator of McNutt's estate, for the hire of a negro by McClure.

There are other grounds and reasons assigned by McClure's counsel, for reversing the judgment, but the above three, are the main and principal causes. The others have nothing in them demanding our attention.

The first objection, as to the costs is overturned by the general law of the land, upon the subject of arbitrations and references. See 16 section of statute, concerning Arbitrators &c., Rev. Code 1845, page 124: "Arbitrators may ascertain the costs incurred in the proceedings before them, and make such order in their award, touching the payment thereof, as to them shall seem just." This is ample authority for the act of the arbitrators; and such awarding of costs, unless prohibited and withdrawn from the arbitrators, by the terms of the submission, will not be considered a sufficient reason to vacate or set aside the award. We find no error, then, in the court below, in overruling this objection.

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McCLURE vs. SHROYER.

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The second objection as to the publication of the award not being in time, has no foundation in fact to rest upon. The articles of submission were dated 25th, September, and the award was made, written out, signed and witnessed, on the 4th day of October following. This is within the ten days, and we need hardly say, that this is a sufficient publication. There is no force then, in this objection; though it was the one on which the appellant relied principally, in the lower court, to vacate the award.

The third objection is as to the act of the arbitrators in suffering Shroyer to produce before them, an account for money due by McClure to him for the hire of a negro belonging to the estate of Mrs. McNutt, of which said Shroyer was administrator.

This objection appears to the court to have more weight in it than any of the others urged by McClure, but the testimony of the arbitrators, Long and Bowen, as preserved in the bill of exceptions, shows that McClure had given Shroyer credit, for this very hiring of the negro, but had not given him as much credit for it as Shroyer claimed the hire to be worth; that McClure made no objection to the nature of the demand, but only as to the amount claimed. We therefore feel inclined to give but little weight to this objection.

Considering the great allowance to be made for the acts of arbitrators, who are, generally speaking, men of plain common sense, unskilled in the law as a profession; who are looked upon by the parties choosing and selecting them, as their neighbors and friends; and fully aware of the importance of these domestic tribunals, in settling disputes without incurring the costs of tedious and expensive litigation, the courts have even lent an unwilling ear to motions to set aside awards, and will not listen to objections unless they involve fraud or corruption in making such awards.

Upon the whole view of the facts, set forth in the record of this case, we are satisfied that the court below committed no error requiring the interference of this court to correct. Its judgment is therefore affirmed.

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HARRIS et al. vs. ENYART.

## HARRIS ET AL. vs. ENYART.

The defendants, as securities for A, signed a blank note, which was to be filled up by A, and to be made payable to the Bank of Missouri at Fayette, for the sum of \$400 00. A, instead of making the note payable to the Bank, according to the understanding at the time it was signed, filled it up by making plaintiff the payee, and delivered it to him for a valuable consideration, he having full knowledge of the facts at the time he received it. Held, that this knowledge of the plaintiff, of the understanding of the defendants at the time they signed the blank, cannot affect his right to recover upon the note.

## APPEAL FROM MARION CIRCUIT COURT.

## STATEMENT OF THE CASE.

In this cause, Enyart, plaintiff below, commenced his suit in the Marion circuit court on a note executed by John W. Burgiss, George Holly, John Harris, Jo. Emery & W. C. Smith, to said Enyart for \$400, dated on the 6th day of February, 1847, and payable two months after date. The defendants all appeared in the circuit court, except Burgis, and plead the general issue. On the trial in the circuit court, the plaintiff obtained judgment for the amount of the note and interest. The defendants offered much testimony, showing that the defendants, with Burgis, had all signed their names to a piece of paper, blank, except the words "four hundred dollars," written, and on the left hand corner in figures "\$400," and that Burgis was authorized to fill up said blank, and dispose of the same as he saw proper. It also appeared in evidence that Enyart purchased the note for a valuable consideration from Burgis.

The court, on motion of the plaintiff, instructed the jury as follows:

"If the jury believe from the evidence that the defendants signed the note in suit, in blank, they thereby authorized Burgis to fill up the note as he saw proper; and if they believe that Enyart gave a valuable consideration for said note, so filled up by Burgis, they will find for said Enyart the amount due on the note, unless they believe from the evidence that Enyart knew, at the time of taking the note, that the defendants signed it for a particular purpose, and that Enyart knew, or either of them objected to its being used for any other purpose."

The defendants, by their attorney, then tendered the following instructions, which were refused by the court.

"If the jury believe from the evidence, that the defendants signed a blank paper with Burgis, to be filled up for the sum of four hundred dollars, payable to the bank of the State of Missouri, at its branch at Fayette, and that the defendants were merely intended to be securities of the said Burgis, and that the note in dispute was filled up over said signatures, they will find for the defendants."

"If the jury find from the evidence, that the note in dispute was written over a blank piece of paper, which was signed by the defendants, merely for the accommodation of Burgis, and delivered to him, and not filled up at the time, the plaintiff must show that he was intended to be filled in as the payee in said note, before he can recover on said note."

"If the jury find from the evidence, in this cause, that the note in controversy was filled up over the signatures of the defendants and Burgis, which were signed to a blank piece of paper and for the accommodation of Burgis as his security, and while blank was intended to be filled up with a note payable to the bank of Missouri, at its branch at Fayette, and Enyart was apprised of these facts at the time the note was filled up to him, and that said note was so used and filled up to the bank as aforesaid, they will find for defendants."

A verdict was found for the plaintiff. The defendants then moved for a new trial and in arrest of judgment, which motions being overruled, they have appealed to this court.

HARRIS et al. vs. ENYART.

**CLARK for appellants.**

1. It appears by the evidence in this case, preserved in the bill of exceptions, that the note sued on was signed in blank, with the understanding at the time, that Burgis, the principal and holder, was to fill it up and present it for discount at the Fayette or Palmyra bank, and there are many facts and circumstances, in evidence, tending to show that the plaintiff, at the time the note was filled up, payable to him, knew for what purposes the signatures were made, and that Burgiss, the holder of the blank thus subscribed, was acting in fraud of the rights of the defendants in making the note payable to him. The position of the appellants then is, that if they signed the note in blank to accommodate Burgis, with the understanding at the time that it was to be made payable to the bank, and negotiated there; and that if the plaintiff knew these facts and permitted Burgis, in fraud of the rights of the defendants, to fill up the note to him as the payee, it was such a fraud upon the defendants as ought to prevent the plaintiff from recovering. The defendants never made the contract sued upon. They never made the promise alleged. It is true their signatures are genuine, but they never consented to the use made of them. They authorized their signatures to be used for the purpose of making the bank their creditor, and they were used to make the plaintiff their creditor, against their will and understanding at the time their signatures were obtained; and if the plaintiff knew (and we presume he did) of the fraudulent use made of their names at the time he received the note, he was not an innocent and bona fide payee, but to the contrary, a fraudulent one, and being such, cannot and ought not to recover the consideration of an innocent and bona fide holder of paper, signed and endorsed in blank. *Monroe vs. Cooper*, 5 Pick. 412; *Oyer vs. Hutchinson*, 4 Mass. 370; *Sargent vs. Southgate*, 5 Pick. 312; *Denniston vs. Bacon*, 15 John. 198.

2. The court erred in the instructions given to the jury for the plaintiff. That instruction laid down the law to be, that the plaintiff had a right to recover, unless he knew at the time he received the note it was signed for a particular purpose, and also that the defendants objected to its being used for any other purpose. It is insisted, that if the plaintiff knew, or had reason to believe, that the note was signed for a particular purpose, and took it contrary to what he knew or believed was the intention and understanding of the parties, he took it subject to whatever defence the makers might have on account of its misapplication. The last instruction asked by the defendants, contained the true ground to place the case upon before the jury, and ought to have been given. *Hall vs. Hale*, 8 Conn. Rep. 336.

**WILSON for appellee.**

The only points for decision in this case are, whether the court erred in giving the plaintiff's instruction and in refusing the defendants instructions.

I contend that the plaintiff's instruction was properly given by the court, if as the evidence discloses, the defendants with Burgis, signed a blank, and entrusted Burgis to fill up the blank, they thereby authorised him to dispose of the same, to any person who would purchase it, and notwithstanding they may have expected he would dispose of the same at the Bank, yet he had the right to dispose of it otherwise. This did not change or affect the liability of the securities. They, in any event, were bound only for the amount of the note, and having authorized Burgis to put it in circulation, they have no right to complain.

2. Enyart purchased the note for a valuable consideration, as appears by the evidence, and without notice from any of the securities of any special arrangement between the parties. To sustain the above points, I cite the following authorities. *Wardell and others vs. Hughes and Moore*, 3rd. Wend. 418; *Bank of Chenango vs. Hyde, Johnson and Whitney*, 4th Cowen. 573; *Powell vs. Waters*, 17th. John. 176.

The court below, did not err in refusing to give the defendants instructions. The object of the defendants in signing the blank, as securities for Burgis, was to enable him to raise money, and it was certainly immaterial to them, whether it was discounted at the Bank at Fayette, or



elsewhere ; it did not alter or increase the responsibility of the securities, the money raised being intended for the use of Burgis. But apart from all this, the evidence in the cause shows that Enyart had no knowledge of any arrangement between Burgis and his securities, and only looked to the responsibility of the names signed to the note.

RYLAND, Judge, delivered the opinion of the court :

This case, from the above statement, presents the action of the court below, in giving, and refusing instructions, before us, for our decision.

The only matters involved, demanding our attention arise from the instructions. It seems that the plaintiff below, for a valuable consideration, became in possession of the note sued on : that the defendants signed their names to a blank piece of paper, or to a piece of paper with four hundred dollars written on the left hand corner, in figures, \$400.

The defendants signed this paper as securities to Burgis, with the calculation on their part, that Burgis would have it discounted at the Bank at Fayette. No doubt that such was the expectation of the defendants. They delivered it to Burgis, and he failed to have it discounted at the Bank, but purchased a negro woman with it, from Enyart.

The court gave the instruction as set forth in the above statement of the case, for the plaintiff, and refused the three instructions above set forth as asked for by the defendant.

There was evidence offered to show that Enyart knew that the defendants signed the note merely as securities, in order to enable Burgis, for his own individual benefit, to discount it at the Bank ; as well as facts and circumstances proved, which might leave this knowledge on the part of Enyart in doubt.

But, taking it for granted that Enyart knew, that the note was made, to be discounted at the Bank ; and that the Bank had refused to discount it ; and that he afterwards obtained the note from Burgis for a valuable consideration ; what effect can such knowledge have, on the liability of the defendants to pay the note ?

Can it be said, that it is a fraud on them to be made to pay the amount to one payee and not to another ? The defendants in this transaction, have but to blame themselves. They placed reliance and confidence in Burgis. They delivered to him the use of their names without even requiring the name of a payee to be inserted on the face of the note, or at what interest or at what credit. If Burgis therefore, failed to carry out his promise to the defendants, they must blame him. By their confidence in him, they enabled him to obtain the money or property of an other, and it is better for the public generally, that he, who by his mis-



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placed trust, enables another to act deceitfully or corruptly, should suffer the losses consequent upon such act, than that others should suffer innocently.

The instruction therefore given by the court below for the plaintiff, seems to us correct, and according to our view of the law governing this transaction, was the proper one to be given.

In the case of *T. & J. Powell vs. Waters*, 17 John. Rep. 176, which was an action of assumpsit by plaintiff, as third endorsors against defendant as first endorser of a promissory note.

The defence in part, consisted of the fact, that the note was made to be discounted at the bank of Newburgh, and that the witness being entrusted with the note to take it to the bank, he had fraudulently put it in circulation. Chief Justice Spencer, in giving the opinion of the court, says, "The first note was made and endorsed to raise money on, and it was entirely immaterial whether it was discounted at the bank of Newburgh, or elsewhere. It did not alter or increase the responsibility of the endorser; the money to be raised, was intended to be for the benefit of *Wood*, (the maker,) and he did receive the money for which the first note was discounted. If the plaintiffs, (*who had discounted the notes themselves*) knew, when they received the note, that it was intended to be discounted at the bank of Newburgh, and had been refused, it would not affect them or establish any fraud."

We consider this case before us, as bearing some affinity to the one just cited from Johnson's Reports.

We concur in the action of the court below in overruling the instructions asked by the defendants. These instructions do not contain the law, and they were properly overruled. The instruction given, left the fact of Enyar's knowledge, that the defendants had signed the note for a particular purpose, and that they or either of them objected to its being used for any other purpose, to the jury.

The jury having found for the plaintiff, we can see no sufficient reason requiring the court below to set aside their verdict and grant a new trial. Finding nothing to demand our interposition, as regards the instructions given and refused, the judgment will have to be affirmed.

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BUTLER, relator vs. CHARITON COUNTY COURT.

## BUTLER, RELATOR vs. CHARITON COUNTY COURT.

A became the purchaser of certain school lands in the county of Chariton:—he executed bonds for the purchase money, to the county for the benefit of the inhabitants of the township, in which the land lies. On the 6th day of February, 1847, the General Assembly of the State, passed an act, which “authorised and required” the county court of Chariton county, to make an order rescinding the contract of sale to A, and to cancel the bond for the purchase money. Held that the above act of the General Assembly is unconstitutional, and that the inhabitants of the township are entitled to the accrued interest upon the bond.

## ERROR TO CHARITON CIRCUIT COURT.

## DAVIS for plaintiff in error.

The only question presented by the record is, as to the power of the General Assembly of Missouri to pass the laws for the relief of William Holland. See session acts of 1846—7, page 304.

It is insisted for the plaintiff, that the attempt to pass the law by the Legislature, was an attempt to exercise judicial power, which, by our constitution, is confided to the courts. See the Constitution of Missouri, article 2nd; 1st sec. of article 3rd; 1st section of article 4th; and 1st section of article 5th.

The power of cancelling a contract, is a power, in our State expressly given and confided to the judicial department of the government, for causes shown, which, according to the rules and usages of courts of chancery, will authorize it. By whatever name the legislature may call their action in behalf of William Holland; it is the exercise of judicial power; it is a decree, cancelling the contract of a party without his being present to be heard, and cannot have the force of a law. See 16 Mass. Rep. 270; 15 do. 454; 8 Wheaton 84.

The title to the sixteenth townships of land in each township in Missouri, was vested in the state, to and for the use and benefit of the inhabitants of each of said townships, for the use of schools, by the act of Congress of the 6th of March, 1820, entitled “an act to authorize the people of Missouri Territory to form a Constitution and State government, &c.” See Land Laws, U. S. page 767.

The State of Missouri never owned the township school lands, except as a trustee for the benefit of the inhabitants; and although she may do many things, as such trustee, it is conceived she has no power to make a voluntary gift of said lands, or of the funds which arise from the sale of them.

For all purposes in this proceeding, the sale of the land by the State to Holland, is to be considered regular, and within the scope of her authority as such trustee; but having sold the land at public sale to a private individual, in order to promote the objects of the grant, by the general government, can she, by a special act of the Legislature, dispossess the purchaser Holland, against his will and repay his money which she takes from the trustees of the township school funds, without impairing the obligation of a contract? See 17th section of the 13th article of the Constitution of Missouri; 3 Story’s Com. con. secs. 1379, 1385; 1 Kent’s Commentaries, Lecture 19 page 413 and 417.

The 1st section of the 6th article of the Constitution of Missouri, amongst other things requires “that the General Assembly shall take measures to preserve from waste or damage, such lands as have been or may hereafter be granted by the United States, for the use of schools

## BUTLER, relator vs. CHARITON COUNTY COURT.

within each township in this State; and shall apply the funds which may arise from such lands, in strict conformity to the object of the grant. One school or more shall be established in each township as soon as practicable, where the poor shall be taught gratis." The General Assembly had power to sell, as this court has more than once decided, (8 Mo. Rep. 475; Pogne and Riggins vs. St. Louis county;) and in this case, eight years after the sale, upon the petition of the purchaser, and after he may have stripped the land of its fine timbers, its only valuable quality, this relief law is passed.

It is contended that the civil or congressional townships, as organized by the act of the General Assembly for school purposes, are not public corporations, created for the *mere* and *only* purpose of the administration of the government; for although education is enjoined as one of the concerns of government, and the case of the General Assembly is enjoined for the promotion of the schools; and fines and forfeitures are appropriated by the State for the same object; yet the principle fund is not from the bounty of the State. The inhabitant of the township has a vested interest in those funds, votes his annual tax, helps to rear the school houses, and this relation is to be perpetual. See Rev. Statutes of 1835, title schools and school lands; Story's Com. on the Constitution, sect. 1387.

This Court has heretofore put salutary checks upon trivial objections to the payment of the purchase money, for school lands. See Bogart vs. Caldwell county, 9 Mo. Rep. 359.

As to this mode of proceeding on mandamus, then demurring and afterwards a writ of error. See 16th John. Rep. 61.

**CLARK and ABELL for defendant in error.**

1. A proceeding by mandamus, is a remedy to compel an inferior court having jurisdiction of the subject matter to act in the premises, but not to correct the judgment of such inferior court after it has acted. 2nd. Bibb. 574; 10th Pick. 244.

2. The county courts have exclusive original jurisdiction in reference to the government of all school lands in the several school districts in the respective counties, and the sole control of the township school fund, and by the school law, have discretionary power to collect the same, or not as may be deemed best by the court, which will be seen by reference to the school law. The county court, having such power, the circuit court has no right to interfere, by mandamus, to control or govern that discretion. School Law, art. 2nd. secs. 9, 17, 18; Experte Bassett 2nd. Cowen 458; Gray vs. Bridge, 11th. Pick. 189; 11th. Mo. Rep. 679.

3. It appears by the answer in this case, which is admitted to be true by the demurrer, that no application was ever made to the county court, by any authorized representative of the school district, to have the bonds collected, and the county court could not be regarded as neglecting its duty, in any view of the case, until a proper application was made by a proper person, and until it appeared clearly, that the money would be lost, unless such application was complied with.

4. The county court, in this case, however, acted in strict compliance with the laws of the State then in force. The Legislature had the power to order the contract rescinded, and no one but the purchaser had a right to complain. The school lands were granted to the State, for the use of the inhabitants of each township for the use of schools. The people are sovereign and have the right, through their agents, to manage and control these lands, in that manner, deemed by them best calculated to preserve the use of the lands or their proceeds to the inhabitants, according to the terms of the grant. In this case, a contract had been entered into for the sale of this land, but the purchase money not being paid, and the title not yet conveyed by the State having the same, her Legislature, by the consent of the purchaser, rescinds the contract, surrenders up the bonds for the purchase money, holding the land for the use of the township, as it was before the contract was entered into.

We insist, that the State, by the passage of the two acts under which the county court acted

violated no principle of the constitution, or any vested right of any citizen or corporation; and we contend that the principles here advanced, are recognized and decided by this court in the case of Maupin vs. Parker, 3 Mo. Rep. 219, and in the case of Payne and Riggins vs. St. Louis county, 8 Mo. Rep. 473.

Judge BIRCH delivered the opinion of the court.

On the third day of September, 1839, William Holland became the purchaser of certin school lands, in township fifty-two of range eighteen, in Chariton county, for the sum of nine hundred and one dollars and sixty cents, and executed his bond to the county for the benefit of the inhabitants of the township accordingly. No question is made but that the sale was regular and valid, or that Holland is in any manner discharged from his liability, except that, by an act of the general assembly, approved February 5, 1847, the county court was "authorized and required to make an order rescinding the contract," and thereupon to cause the bond of Holland to be cancelled, and to charge no interest against him after the 3rd day of September, 1844. The county court having conformed its action to the legislative direction, the relator, who is the school commissioner for the township, filed his petition in the circuit court, praying such proceedings as might compel the payment of the interest due and accruing upon said bond. The circuit court having accordingly awarded a condition mandamus, and the county court having replied, and relied upon the statutory enactments alluded to, the question comes fairly enough before us upon the decision of the circuit court, overruling the relator's demurrer to the defendant's answer.

Regarding the legislative authority to authorise the *sale* of these lands, as falling within the doctrine of "*stare decisis*," the proposition before us resolves itself into the simple enquiry, whether having done so, and the land having been sold accordingly, its agency did not therefore cease and determine? In this proposition will of course be involved the preliminary enquiry as to the character under which the State had jurisdiction of the question. Whether in virtue of its sovereignty as grantee, or as a mere intermediate fiduciary, or trustee of an expressed trust.

The language of the grant, it being the first of five propositions, which were submitted to Congress and accepted by the State, as an equivalent for suspending the power of taxing the public lands for five years, and certain military lands for three years, is in these words:

"*First.* That section numbered sixteen in every township, and when such section has been sold or otherwise disposed of, other lands equivalent

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thereto, and as contiguous as may be, shall be granted to the State, *for the use of the inhabitants of such township for the use of schools.*"

Whilst it is conceded that the general government granted these lands, as well as others, for the equivalent alluded to, yet for what *purpose*, and as implying what duties, they were thus granted and accepted, would seem to be clearly enough denoted in the terms of the grant itself. To remove all doubt, however, we need but quote the language of the very next proposition, respecting the Saline lands, in these words :

"*Second.* That all salt springs, not exceeding twelve, with six sections of land adjoining to each, be granted to the said State *for the use of the said State,*" &c.

It must be obvious from the different phraseology adopted, that whilst the State had unrestricted authority to do with the Saline land money, whatever it pleased, and hence, of course, could *not* be considered as a trustee in relation to *that*, the *reverse* was purposely the case respecting the township school lands. They were granted to the *State*, to be sure, but distinctly as a *trustee*, to be dealt with "for the use of the inhabitants," including, of course, the children of the school township respectively. Hence the following cotemporaneous constitutional recognition of the *duty*, and as it seems to us, the whole duty of the *legislature*, in regard to them.

"Art. 6, sec. 1. Schools and the means of education, shall forever be encouraged in this State, and the general assembly shall take measures to preserve from waste or damage, such lands as have been, or may hereafter be granted by the United States for the use of schools within each township in this State, and shall apply the fund which may rise from such lands, in strict conformity to the object of the grant," &c.

It need scarcely be said, that the law under which these lands were sold, directed the application of the interest of the purchase money to the purposes of education in the township from whence it was derived. Having, therefore, embodied and presented the congressional, conventional and legislative provisions upon the subject, it would seem that, to combine and apply in a single paraphrase, at once, the essence of the grant, the requisitions of the constitution, the legislation which authorized the lands to be sold, and the rights and duties arising under that sale, would be to write it thus : "The United States has granted to the State of Missouri, for the use of the inhabitants of township 52, range 18, in Chariton county, for the use of schools in said township, the annually accruing interest upon the money arising from the sale of the 16th section of land contained therein, of which the proportion, to be paid



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yearly by William Holland, is 90 dollars and 16 cents." The whole remaining question, therefore, is, had a subsequent legislature of the State, even as the accredited organ of its *will*, the *power* to divest the inhabitants of that township of the rights and benefits thus secured and accruing to them, or did not the authority of that body naturally and necessarily terminate with the sale of the land, and the remainder of the trust thenceforward devolve upon the township school authority and the courts? It seems to us that the question can admit of no other answer, than that the general assembly was as powerless, under the constitution of the United States, to impair or abrogate a contract thus concluded, or to interfere with rights thus vested, as it would have been to impair the obligation of any other contract, or divest a citizen or citizens of any other right.

That the case in question may or may not have been a hard one, invoking not merely proper personal sympathy and consideration, but even entitling the purchaser to the possible interposition of a court of chancery, need not of course be further speculated upon here, than as suggesting a recurrence to the judicial maxim, as old and even as honored as human nature itself, which is, that "hard cases sometimes make bad laws." Be this as it may, the judgment of the circuit court must be reversed, and the cause remanded for a peremptory mandamus, according to the alternate or ultimate prayer of the petition.

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### TEMPLE *v.* COCHRAN.

This was a suit by attachment. The affidavit alleges the facts set forth in the third subdivision of the first section of the act, "That the defendant has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him." The writ was in fact served upon the defendant. The defendant filed a plea, in the nature of a plea in abatement, putting in issue the facts set forth in the affidavit. Under this plea, the only issue to be tried by a jury is the fact whether the party so absconded or absented himself as to prevent the service of a writ: The *intention* to abscond, is not a question for their inquiry.

APPEAL FROM CHARITON CIRCUIT COURT.

STRINGFELLOW & LEONARD, for appellant:



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The only question in the record is, what is such an "absconding or absenting," under our attachment laws, as will subject a person's estate to that process.

1. It is sufficient if it be *with intent* to prevent the ordinary process of law from being served, although it may not have that effect; and if this construction be correct, the plaintiff's first seven instructions ought to have been given. They proceeded upon this interpretation of the statute, and there is nothing in the objection, that this was not the issue; for the issue is in the words of the statute and means what the words of the statute mean, and nothing more nor less.

2. But if there be no question about the intention, but only on the fact of such "an absconding or absenting," as will prevent the service of a summons; still it is sufficient, if it be such an absconding or absenting as will defeat its service, if there be only ordinary diligence used to execute it. There need not be such an absconding or absenting, as will render the service absolutely, physically impossible. The object of the law was, to allow a suit against the estate, if a suit against the person should be prevented by the defendant's absconding or absenting himself, and the law ought to have such a reasonable construction as will make it of some practical value, and not a mere trap to catch plaintiffs in. The general law of the land, only requires ordinary diligence of its officers, in their efforts to execute writs; and of course, all the attachment law requires, is such an absconding or absenting as will defeat the service of a writ, if that degree of diligence only, is exerted that the law imposes upon its officers. Here, the court instructed the jury in the words of the statute, and when the plaintiff asked an explanation of its meaning, as applicable to the case on trial, by declaring, that "the jury may find for the plaintiff, although they may find that, at the time of the making the affidavit, it was physically possible to have served the defendant with the ordinary process of the law." The court refused the instructions and that determined the plaintiff's case. The defendant had not gone without the county, and the writ was in fact, personally served, and of course, as the circuit court interpreted this clause of the law, the attachment did not lie.

**CLARK, for appellee :**

1. In this issue, the indebtedness of the defendant to the plaintiff was admitted, and her indebtedness to others was immaterial to the issue to be tried, consequently, the whole of the evidence rejected by the court, (and for the rejection of which the appellant complains,) was properly rejected. This question has been expressly decided by this court, in the case of Switzer & Harrison vs. Carson & Hays. 9th. Mo. Rep. 740.

2. The statute of this State, title "Depositions," Rev. Statutes, 1845, page 416, gives every party the right to object to any deposition for competency or relevancy at the trial, in the same manner and with the like effect as if the witness was then present in court. Any rule of court therefore, in derogation of this statutory right, is void and cannot rightfully govern the action of the court, or the rights of the parties. The rule may have been made, and in this instance was made before the passage of the act. But admitting the rule of court had precedence of the statute, yet if the evidence in the deposition was clearly irrelevant, it ought not to have been allowed by the court, though no objection was made to it, and if it had been read and contained no matter relevant to the issue, it could not properly govern the action of the jury, and therefore this point, we consider, is of small importance in this case, in any way it may be viewed.

3. To determine the correctness or incorrectness of the decision of the circuit court, in refusing, as well as in giving the instructions presented by both parties in this case, reference must be had to the first section of our attachment act. The words in this affidavit, on which the right to an attachment is predicated, are "the affiant has good reason to believe, and does believe that the defendant has absconded or absented herself from her usual place of abode in this State, so that the ordinary process of law cannot be served on her." The evidence in this case shows, that at the time of making the affidavit, the defendant had not left the county,

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but to the contrary, she was then in the county, and the process was served upon her. The whole of the instructions asked by the plaintiff, contain the principle, that if the defendant intended to abscond or absent herself, to prevent the execution of process, and had left her usual place of abode with that intention, she thereby subjected herself to attachment under the subdivision of the statute contained in the affidavit, as well as if she had actually left the county, or jurisdiction of the court.

It is insisted that this affidavit is not authorized, while the ordinary process of law can be served, however fraudulent the intention of the defendant may be, or whatever may have been her intention.

The plaintiff has selected his cause for the attachment, and sworn to it; the defendant denies it. He must prove it. If she had concealed herself, so that the ordinary process could not be served upon her, he ought to have said so. That is made one cause for attachment in the statute. If she was about to remove her property and effects out of the State, it ought to have been so charged; that is also a cause for attachment.

The person of no one can be attached for debt; this proceeding is only authorized against the property. We see therefore the propriety of allowing the writ to issue, when the property is about to be removed, while there is great propriety in requiring the parties to have absconded or absented themselves, so that the process could not be served on them in the ordinary way, before an attachment against the property is allowed; for as long as the parties are in the county, or jurisdiction of the court, they can be sued by proceeding in the ordinary mode, and in this case there was a personal service on the very day the attachment issued.

If we are correct in this construction of the attachment law, the instructions given for the defendant must be right.

**Judge BIRCH**, delivered the opinion of the court:

This was a suit by attachment. The words of the affidavit upon which it was issued being, "That the said affiant has good reason to believe, and does believe, that the said defendant has absconded or absented herself from her usual place of abode in this State, so that the ordinary process of law cannot be served upon her."

In point of fact, the writ *was* served upon the defendant, within the county, the day after it was issued, and the evidence was satisfactory that she had not been out of it. Her conduct had been of a character, however, which might well enough induce the belief that she had absconded at the time the affidavit was made, and the writ issued; and the plaintiff, therefore, upon the trial of the issue in abatement, asked instructions to the effect, that if the jury believed it to have been the intention of the defendant, to prevent the ordinary process of law from being served upon her, and that, therefore, she absconded or absented herself from her usual place of abode, in such manner as might and probably would have defeated the service of the summons upon her, they might find for the plaintiff; although at the time of making the affidavit, it *was* physically possible to have served upon her ordinary process.

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The court declined to give the instructions asked by the plaintiff, but gave others, to the effect that the *instructions* of the defendant were not in issue, and consequently not a subject for the consideration of the jury; and that, the only question for their determination was, whether at the time of making the affidavit the defendant, had "absconded or absented herself from her usual place of abode, in this State, so that the ordinary process of law could not then be served upon her."

Had the facts in the case been deemed by the jury, analogous to those which were hypothetically assumed in the instructions referred to the plaintiff, on the question of "absenting herself," it would have been competent and proper for them to find the issue against her, without any plainer instruction than the one above quoted. It will be perceived, that it is not only clear, but that it contains alike the words of the law, the affidavit and the plea; and of course presents the *issue*. Whatever therefore, may be the thought of the *apparent* defect of the statute, we deem that the circuit court did right, in conforming its instructions to the terms in which it was written by the legislature. The remedy by attachment being strictly statutory or legislative, and that body having only authorized the "intention" of the party to be considered in two of the nine cases under which the writ may issue, and this not being one of them, the courts may regret, but cannot supply the seeming defect.

Although the record in this case is a somewhat heavy one, yet deeming that the point relied upon, has been sufficiently made and met by what has been written, we but add, that could we discover any ambiguity in the law upon which this proceeding was predicated, we would of course be inclined to attempt such a solution of it as would best promote the apparent ends of justice and of right. Where however, as in this case, the legitimate expressions are not only clear but apparently *discriminating*, neither the circuit courts nor this court can, of course, have any legitimate latitude or discretion.

The judgment of the circuit court is accordingly affirmed.

NAPTON, J.

I concur in affirming the judgment. The question of fact for the jury was, whether the party so absconded or concealed herself as to prevent the service of a writ. The law is aimed at the actions of a debtor, and it is not politic, in my judgment, nor was it so designed, to put to the jury the question of *intention*. The law, as it now stands, I consider sufficient to meet every case, where the conduct of the party defendant

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is such as to prevent the service of process, by the exercise of ordinary diligence on the part of the officer.

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### SUTTON vs. SMITH.

In an action for slander the defendant, upon the trial of the issue, made upon the plea of not guilty, may prove that the publication of the words set forth in the declaration, was procured by the fraudulent contrivance of the plaintiff himself, with a view to an action.

#### ERROR TO CLAY CIRCUIT COURT.

#### STATEMENT OF THE CASE.

The plaintiff in error, Sarah Sutton, instituted her action of slander in the Clay circuit court against the defendant, Smith, in the month of September, 1846. The declaration contained four counts. In the 1st, 2nd and 3rd counts, she charges that the defendant, on the 10th day of June, 1846, at Clay county, accused her with having stolen his corn; and in the 4th count, that he had accused her with having stolen the corn of him, the said defendant and one John Ogden, laying the damages at \$5000.

To this declaration, the defendant, at the return term of the writ, filed the plea of not guilty and of justification.

In the plea of justification, the defendant alleges that he had a right to speak and publish the words alleged to have been spoken by him, because the plaintiff did in fact, feloniously steal, take and carry away, certain goods and chattels, that is to say, one bushel of corn, the property of him and the said John Ogden, on the 1st day of May, 1846, at said county of Clay, being of the value of one dollar.

To this plea of justification the plaintiff did not reply.

Afterwards, at the February term, 1847, of the court, the case being called for trial, the defendant, by leave of the court withdrew the plea of not guilty, and thereupon a jury was sworn to try the cause, upon which being done, the defendant filed his motion to *non pros*. the plaintiff, because she had not replied to nor taken issue upon the plea of justification. This motion was sustained by the court, and the plaintiff *non prosced*. Whereupon the plaintiff then moved to set the judgment of *non pros* aside, and to reinstate the cause upon the docket, upon the ground, as alleged in the motion, that the plea of the defendant was but to one count of the declaration, and that there were other counts therein to which the defendant had not plead, and that therefore she was entitled to a judgment by *nil dicit*.

This motion of the plaintiff to reinstate the cause upon the docket, was accompanied by her affidavit, in which she states, that she has merits in the action, and that upon the trial of the cause she will prove that the imputations of felony in said declaration, in manner and form as charged, were made by said Smith, and they were wholly false.

The court sustained this motion, and reinstated the cause upon the docket, and overruled the motion of plaintiff for judgment by *nil dicit*, and granted the plaintiff leave to reply to the

## SUTTON vs. SMITH.

said plea, and also granted the defendant leave to reinstate upon the docket his said plea of not guilty that had been withdrawn; which being done, and the replication filed, the court thereupon adjudged that the plaintiff should pay all the costs up to that time.

The plaintiff, in her replication, denies that she stole any of the goods, chattels, or corn, of the said John Smith and John Ogden, as in the said second plea is falsely alleged, and that the said defendant, Smith, at the time when, &c., as mentioned in the declaration, of his own wrong, and without the cause by him alleged in the introductory part of the plea, did commit the said several grievances in the introductory part of that plea mentioned, and as in her said declaration set forth.

The defendant excepted to the opinion of the court in setting aside the judgment of *non pros*, and reinstating the cause upon the docket; and also to the opinion of the court in permitting the plaintiff to reply to said replication. The case being thus at issue, the same came on to be tried at the August term of the court in the year 1848, whereupon a jury was sworn, and the plaintiff, to prove the issues on her part, gave certain evidence, and the defendant evidence to sustain his defence. The evidence being closed, the plaintiff and defendant each asked for instructions.

The jury found their verdict for the defendant upon the plea of not guilty, and for the plaintiff upon the plea of justification.

Motions for a new trial and in arrest were made and overruled, and the case brought to this court by writ of error.

## ABELL &amp; STRINGFELLOW for plaintiff in error.

1. Although plaintiff had a verdict on the plea of justification, she may yet complain of the errors of the court in giving and refusing instructions asked with immediate reference to that plea. Those errors, under the peculiar circumstances of this case, manifestly misled the jury, and tended to induce the verdict found by them. The conduct of the plaintiff, which is alleged to have induced defendant to believe the charge made by him, is no justification. It will not, even as admitted by plaintiff's instruction, which was refused, necessarily go in mitigation. It is no mitigation, where, as in this case, the defendant advised that the charges is false, reiterates it in a plea of justification. There is no pretence of authority or principle for holding such facts a complete defence, a legal excuse. 2 Starkie on Evidence, 643; 2 Greenleaf, 345, sec. 426, 343, 228, 229; 3 Mass. R. 546; 1 Pick. 1; 5 Pick. 296; 2 Pick. 113.

The plea of justification only extended to 4th count. 11 John. 38; 13 Wen. 9.

2. The costs at the February term, 1848, should have been taxed against defendant. Rev. Stat. p. 816, sec. 3.

## HADEN for defendant in error.

1. I insist that the circuit court did not err in giving to the jury, upon the trial of the cause, the instructions complained of by the plaintiff. These instructions assert and maintain, very correctly, as I conceive, the principles that upon the trial of the issue, taken upon the plea of not guilty, pleaded by the defendant to the action, the jury should be satisfied from the evidence, that the defendant was guilty of speaking and publishing the words alleged in the declaration, *falsely and maliciously* in order to warrant them in finding their verdict for the plaintiff. That the wrong and injury complained of should appear to have been committed by the defendant as charged, and not at the request of the plaintiff, nor invited nor procured by her contrivance, nor with her will and consent, for the purposes of the action, upon the ground that she has no right to complain of *that* as an injury, which she has willingly occasioned. See 2nd Starkie's Evidence, part 4th, page 876 and note referred to; 2nd Greenleaf, sec. 421,

p. 311; Starkie on Slander, 169 and 538, bottom paging; 3 Bos. and P. p. 592, 593; 5 Esp. Rep. 15; 1 T. Rep. 112.

2nd. I hold that the plaintiff has no more right to demand compensation for an injury, which she has by her acts and contrivance procured to be inflicted upon her reputation, (if she have any) than she would have if she had requested the same to have been done by word. Or, in other words, if she has caused the injury to be done of which she complains, it matters not what means she adopted, nor what agent she employed to effect it. By such conduct, she becomes the inserter of her own rights, and is bound by law to submit to the loss sustained, if any. There was very satisfactory evidence, to my mind, given to the jury, that if the defendant did speak the words charged in the declaration, they were not spoken *maliciously*, but, on the contrary, they were spoken honestly, under a well founded conviction of mind that they were true, and that they were spoken with the consent, by the contrivance, and according to the wish and desire of the plaintiff.

3. It is just as essential that the words in this action should be shown to be maliciously spoken, as that they were falsely spoken. Malice, in the speaking of the words, lies at the very foundation of the right of action. It is true, that if the words spoken be actionable in themselves, and be false or untrue, the law implies that they were spoken in malice; but this presumption (like all other presumptions) may be rebutted from the facts and circumstances attending the speaking, or by the proof showing that it was no malice; such as the proof that was given in this very case. 2 Starkie Ev. pp. 864, 4, 5, 6, 7, 905, 6; 3 Gannt 246, 254, 258; 7 Carr & Payne, 302; Starkie on Slander, page 174.

4. The jury had the right to weigh the evidence, and if satisfied that the plaintiff had failed to prove the existence of any one essential ground of the action, to find their verdict for the plaintiff upon the plea of not guilty, as also to find the evidence insufficient to prove the plaintiff guilty of larceny, as set up in the plea of justification. They had a right to find on the plea of not guilty, that the words were untrue and not maliciously spoken, but spoken honestly, and induced and moved by the contrivance of the plaintiff herself, for the purposes of this action.

They had a right to find upon the other plea, that the plaintiff was not a thief in fact, but that she acted just like a thief would, in taking and carrying away the corn of another from his crib, showing by her acts that she knew how such larcenies are perpetrated, and withal, manifested a strong desire to rob her neighbor of his money, for an injury (if any) which was perpetrated virtually by herself. And the jury, exercising this authority, did find their verdict for the defendant upon the plea of not guilty, and for the plaintiff upon the plea of justification; and in doing so, they were well warranted, so far as the defendant is concerned. Nor is there any ground, as I humbly conceive, upon which the court below would have been warranted in setting aside the verdict of the jury upon the motion of the plaintiff therefor.

**RYLAND, Judge, delivered the opinion of the court:**

From the above statement, it appears that the plaintiff, Sarah Sutton, sued John Smith in the Clay circuit court, in an action of slander. Smith filed his pleas of not guilty and justification.

On the trial, the plaintiff gave evidence to prove the words as charged; and the defendant gave evidence, showing, that the words spoken were induced by the act of the plaintiff herself.

The words charged are, that "Mrs. Sutton stole my corn," "that Mrs. Sutton stole our corn," meaning the corn of said Smith and one John



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Ogden. The testimony of the plaintiff fully proved the words as charged in her declaration. The defendant then proved, that the plaintiff had stated, "that Smith and Ogden had been watching her, and that she took an apron full of her own corn and went with it down to the crib, in order to devil them; she said they had been accusing her of stealing their corn; that when she had carried her corn down to the crib, she threw it to her hogs." That knowing that she was watched by Smith and Ogden, she would go up to the corn crib, and throw out to her hogs, her own corn; that if she got hold on them, (Smith and Ogden,) she would make them smoke—she would sue them."

It appears that the tract of land on which the plaintiff lived, had been bought at a sheriff's sale as the property of the plaintiff's husband, Jonas Sutton, in his life time by one Abram Creek; that Creek sold the land to Smith, the defendant, and to John Ogden; that Smith and Ogden had raised a crop of corn on the land, and had put the corn in a crib on the place, near the mill house, and that the plaintiff still occupied the mansion house.

The main question for our determination arises on the instructions given by the court below. From these instructions, the jury were induced to find their verdict for the defendant on the issue, upon the plea of "not guilty," and for the plaintiff on the issue made on the plea of "justification."

I will here insert some of the instructions given for the defendant.

1st. "If the jury believe from the evidence, that the words in the declaration mentioned *were* [as] published by defendant, were procured by the contrivance of the plaintiff, then they will find for defendant."

3rd. "If the jury believe from the evidence, that corn was placed in defendant's crib, by plaintiff, without the knowledge of the defendant, and was afterwards thrown out by plaintiff to her hogs, in such manner as to deceive defendant, and to induce him to believe that it was his corn she fed to her hogs, and that the circumstances of the case were such as to induce a reasonable belief of that fact, they will find for the defendant under the general issue."

The court of its own motion gave the following instruction. "If the jury find from the evidence, that the defendant spoke the words as charged in the declaration, they will find for the plaintiff, unless they also find that the plaintiff was guilty of stealing the corn as alleged in the plea of justification, or unless the speaking was procured by the contrivance of the plaintiff."

These instructions present to us the main question in this case. There

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are some other minor points which we consider not worth our attention.

The question here involves the principle of the maxim "*volanti non fit injuria*." We think the maxim very applicable to the circumstances of this case. Greenleaf in his treatise on evidence, 2nd vol. page 341, sec. 421, says, "under this plea, (that is the general issue,) also, the defendant may prove the publication was procured by the fraudulent contrivance of the plaintiff himself, with a view to an action."

We fully accede to this authority, and consider it sufficient to sustain the court below, in giving the instructions in this case. No person has the right to entrap another, by false and fraudulent appearances, in order to induce an act on which to form a claim for damages in a court of justice. A plaintiff, who will so act, as to induce a reasonable man to charge him with larceny, should abide the effect of such charge, without coming into court, and asking a compensation for the injury which he has thus voluntarily caused to be inflicted upon himself. He who thus acts, values money more than character.

We consider the instructions given in this case, were warranted by the facts as they appear from the record as well as the law governing such cases.

Upon the subject of costs, we think the court below ought to have taxed the costs of the February Term, 1848, at which this suit was continued on the motion and application of the defendant Smith, against said Smith. I am therefore for reversing this case so far only as regards the costs of that term, which should be taxed against the defendant. In all other matters, the judgment of the court below is, in my opinion, correct, and my brother, Judge Napton, concurring herein, the judgment of the court below is reversed, and this suit is remanded to the circuit court of Clay county, with directions to tax the costs of the said February term, 1848, against said defendant Smith, but in all other respects to remain as it is, there being no other error.

Judge Birch having been of counsel, did not sit in this case.

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HAWKINS & BLACKWELL Adm'rs. of BLACKWELL vs. RIDENHOUR.

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## HAWKINS & BLACKWELL, ADM'RS. OF BLACKWELL vs. RIDENHOUR.

1. Where the payee of a note merely advises the principal to carry his property to a better market, out of the State, sell it and return and pay his debts, and if unable to pay all, to pay *pro rata*, is not a fraud upon and will not operate as a release to, the securities in the note.
2. No delay on the part of the creditor, will operate to release the security, which would not act as a bar for the principal.
3. If the publication of the notice to creditors required by the 20th section of the 2nd article of the act concerning the administration of estates, be not commenced within thirty days after the grant of letters, debts against the estate are not barred, after the lapse of three years.
4. All judgments, rendered since the act approved January 15, 1847, "regulating the interest on money," took effect, can bear only six per cent. interest, no matter what interest the instrument, on which the judgment is founded, bears.

### APPEAL FROM CRAWFORD CIRCUIT COURT.

#### STATEMENT OF THE CASE.

This was an action of debt brought by Ridenhour, plaintiff below, against Wm. E. Hawkins, administrator, and Nancy Blackwell, administratrix of Richard Blackwell, dec'd.

The suit was brought on a note for \$400, given to the plaintiff by Isaiah King, Thomas L. Veech and Richard Blackwell, bearing 10 per cent. interest from date, payable on or by the 1st of March 1839, and dated 19th November 1839. At the May term 1849, the defendants filed the statutory plea, and the parties went to trial. The plaintiff, Ridenhour, offered in evidence the note sued on, and the letters of administration granted by the clerk of Crawford county to the appellees as administrator of Rich'd. Blackwell, dated 23d December 1839, and here closed his case. Thereupon, the defendants offered in evidence, on their part, the notice of grant of letters of administration, signed by Wm. E. Hawkins, adm'r. alone, stating that the undersigned had obtained from the clerk of Crawford county court, letters of administration on the estate of Richard Blackwell, requiring all persons indebted to said estate to make immediate payment, and those having claims against the estate to present them within three years, or they would be barred. The affidavit of E. L. Edwards, publisher of the Jefferson Enquirer, states that this notice was published in his paper, first, on the 23d January, 1840, and thereafter for three weeks on the 30th January and 6th and 13th February. G. P. Wyatt was then introduced as a witness, whose testimony is fully set out in the bill of exceptions, the substance of which is, that Isaiah King was largely indebted; that some judgments had been obtained against him; that one Baker of Montgomery had brought suit against him for some nine hundred dollars, principal, and that the petition had been served by witness while sheriff of Gasconade; that one McKenney, had brought suit against him for about this amount; that witness, Ridenhour, and R. M. Wyatt, all being the intimate friends of King, went to him and advised him to take his property to Louisiana or Mississippi, sell it for the best price he could, and pay his debts, and if he could not pay them all to pay *pro rata*. Witness said he believed that King's property would not have paid more than two-thirds of the judgments obtained and the debts then sued upon. He further said that he was not certain that King would apply the money to the payment of his debts, but believed that Ridenhour had implicit confidence in King, that he would come back and pay his debts as far as his money would go. He further states, that King was indebted to his sister-in-law, Mrs. Lowry, about \$250; to himself about \$100, and to his brother R. M. Wyatt, about \$100, when they advis-

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ed them to go. That there was a negro sold, prior to King's taking away his property, under execution against King, and that Ridenhour purchased the negro at constable's sale, King having furnished him the money to do so; which he gave up to King a short time before he left, and he took her off with the rest of his negroes. That King did not take his family at that time, but returned in some six or eight months after he left and staid at home some three or four months and then went away again, and some three or four months after King left the second time, his family left, and he has never resided in Gasconade county since. That King did not pay any of his debts on his return, and knows that the McKenney and Baker debts, Mrs. Lowry, R. M. Wyatt and himself, were never paid. King left a large amount of notes and accounts with one Thomas L. Veech to collect for him, and Veech said to witness that he had collected all the notes and accounts except a small amount. (The declaration of Veech was objected and excepted to by the plaintiff.) Witness further said, that Ridenhour had sued Veech, one of the securities, obtained judgment and had execution, but made nothing, as Veech was insolvent. That in 1845, Ridenhour asked witness if he believed the money could be made out of Blackwell's estate, or whether he believed it would be barred by limitation, and witness told him that he did not know, but that he had better advise with Mr. Scott of Potosi, as he was an old and experienced lawyer.

Here the case closed, the foregoing being all the evidence offered on either side.

At the instance of the plaintiff, the court gave to itself, sitting as a jury, the following instructions:

1. "That to enable the defendants to set up the bar of three years, they must show that within thirty days after the grant of letters, they gave the notice required by law to all creditors, and that the commencement of publication in the newspapers, after the expiration of the thirty days, is not sufficient."
2. "That said notice to be legal, should be signed by both the administrators, and if the court find it was signed by one administrator only, it is in law no notice at all."
3. "That the commencement to publish the notice in the newspaper thirty-one days after the grant of letters, will not operate as notice to the plaintiff."
4. "That in order to entitle the defendants to be discharged, it must appear that the plaintiff either extended the time of payment by a legal and valid agreement, founded upon a valuable consideration, without the knowledge of the security, or that he, without the knowledge of the security, released property upon which the law gave him a lien; but on the contrary, if the plaintiff honestly advised the principal to take his property to the best market, sell it for the best price, and return and pay his creditors pro rata, with the proceeds, that such a transaction would be fair and legitimate, and would not be injurious to the present defendant's interestate estate.

The defendants asked the following instructions, which were refused:

1. "That the omission to publish the notice to creditors of the grant of letters within thirty days, does not prevent the operation of the statute of limitations; it merely postpones the operation of the statute for the length of time the omission contained."
2. "That if the court, sitting as a jury, believes from the evidence, that Ridenhour, the plaintiff, advised King, the principal in the note, to remove his property from the State, and assisted him in doing so, that they thereby perpetrated a fraud upon the security in the note, and precluded himself from recovering against the securities."
3. "That the notice to creditors being signed by Hawkins alone, does not vitiate the notice."
4. "That the security of King had an interest in having King's property retained within the jurisdiction of the courts of this State, and if the jury believe from the evidence, that Ridenhour assisted in removing his property from this State, he has thereby diminished his chances for making the debt from the principal, and has thereby released the securities."

The court found a verdict for the plaintiff, upon which judgment was rendered, and the defendants prayed an appeal, and have brought the case to this court.

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## JOHNSON, for appellee.

From the instructions given and refused, it is manifest that the circuit court was called upon to decide the following points:

1. Whether the notice signed by the administrator *alone*, when there was an administratrix also, is any notice at all.

2. Whether, regarding it as a notice, the commencement to publish it thirty-one days instead of thirty after the grant of letters, does not deprive the administrators of setting up as a bar, the special limitation of three years.

3. Whether the acts of Ridenhour, under the circumstances, discharged the surety.

1. Upon the first point, it is insisted that the law laid down by the court, is correct. Where there is more than one executor or administrator, the law requires that a majority shall join in receipts and discharges, otherwise they shall be void. Adm'rs. art. 2, sec. 51, Stat. '35. Now, one is not a majority of two, therefore where there are but two administrators, they must both join to satisfy the statute, and render receipts and discharges valid. Why should both administrators, where there are only two, be required to sign, in order to make a valid discharge in fact, and both not be required to sign a notice, which, when published, is to operate as a discharge in law? In pleading, the rule is, that all the administrators must join. *Hunt vs. Kenney*, 2 Penn. 721; *Bodle vs. Hulse*, 5 Wend. 313; *Chitty's Pl.*

2. Upon the second point, the court laid down the law correctly. In the instruction given to plaintiff by the court, it is conceded in accordance with the opinion of this court, in *Montelius & Fuller vs. Sarpy*, 11 Mo. Rep. 237, that it would be sufficient, had the publication of the notice to creditors been commenced within thirty days after letters granted. The point is, that it was too late to commence after the thirty days had expired. In the computation of time, the English rule (which is also adopted in some of the courts of this country,) is, that where an act is to be done within so many days after a specified fact, the day of the fact is included. *Starkie Ev.* 1399, Title "Time;" *Castle vs. Burdett*, 3 T. R. 623; *Glassington vs. Rawlins*, 3 East. 407; *Arnold vs. United States*, 9 Cranch, 104, (3rd Cond. 330;) *Pierpont et al. vs. Graham*, 4 Wash. C. C. R. 232. But perhaps the modern rule is to exclude the 1st. day and include the last. The letters were granted 23d Dec. 1839, and as Dec. has 31 days, if you include the 1st day, the 30 days expired on the 21st January 1840, if you exclude the first day, the 30 days expired on the 22d January, 1840. The publication of notice (if it can be regarded as such,) was not commenced until the 23rd January, two days too late by the English rule and one day too late by the modern rule. If the administrator could delay one day, he might five, and if five then 10, 20, 100 or any greater number. The following among many other cases turned upon the point, that a particular thing to be done was too soon or too late by *one day*. *Castle et al vs Burdit et al*, 3 T. R. 623. *Lester vs Garland*, 15 Vesey 246. *Glassington et al vs Rawlins et al*, 3 East. 407.

3. Upon the third point, it is proper to refer to the 4th instruction of plaintiff and the 2nd and 4th of defendants. It will be perceived, that the defendants put their right of discharge upon the ground that the plaintiff advised King to remove his property from the State, and they asked the court to declare the law that the advice was a fraud in the fact of the attending circumstances which showed that the advice was for the benefit of the surety. The evidence is that King was greatly indebted. Judgments had been already rendered against him and suits had been instituted against him which would shortly be reduced to judgment: that his property would not pay more than two thirds of the judgments rendered and the debts sued on—that G P Wyatt, R M Wyatt & Ridenhour, all being the intimate friends and likewise creditors of King, go to him, tell him to take his property to Louisiana or Mississippi, sell it for the best price and pay *all his creditors pro rata*.

There is no evidence of fraud or bad faith in this. They saw that others were before them; that King's property would soon be swept away by executions on other debts and they be cut out, and they advised him to do an act which would enable him to put them on an equal foot



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ing with the other creditors. This was certainly for the benefit of the surety. The other creditors of King might have complained of this advice, but Blackwell could not. It would have been useless for Ridenhour to have attempted to make any thing by suit, because King's property would have been entirely consumed by the other creditors before he could have gotten judgment. The date of this transaction is not given by the witness, and therefore laches cannot be made out against Ridenhour. If he was tardy in suing King, it was the province of Blackwell or his administrators to hasten him by notice in writing. As between creditors, and surety, there is no obligation of active diligence by the creditor against the principal.—The People vs Jansen, 7 John. Rep. 339. Nor will mere delay by the creditor, in calling on the principal, discharge the surety. Trent Navigation co., vs Harley, 10 East. 34 and notes to new edition. Peel vs Tatlock, 1 Bos. & Puller, 419. Ferguson vs Turner 7 Mo. Rep. 496. Nichols vs Douglas & McCulloch, 8 Mo. Rep. 49. It cannot be pretended that Ridenhour made any agreement by which he tied his hands, because he made no agreement, but merely gave advice, and as to the fact, which the defendants in their 2nd & 4th, instructions ask the court to find, to wit, that Ridenhour assisted King to remove his property, nothing of the sort appears in the evidence.

The witness stated, that Ridenhour purchased at constable's sale, one of King's negroes, with King's money, and gave her up to him a short time before he left, and he took her off with the rest of his negroes. It does not appear that any importance was attached to this fact in the court below. No instructions were asked on either side, nor was the court called upon in any other manner to say what this fact amounted to and therefore this point cannot be raised now for the first time, because this court will only review the points decided by the court below. Steamboat Thomas vs. Erskine & Gore, 7 Mo. Rep. 213—Comelius et al vs Grant et al, 8 Mo. Rep. 59. We may remark, however, that whether this purchase was before or after the advice given to King by the two Wyatts and Ridenhour, does not appear. Where there is nothing to the contrary, that presumption will be indulged, which will favor the opinion of the court below. It is not at any rate a matter of importance. Ridenhour acted as the mere friend and agent of King. By such agency, he acquired no lien upon the property, by which he could hold it for the payment of the note to which Beech & Blackwell were securities. The negro was neither pledged nor mortgaged to him. Had she been levied upon, while in Ridenhour's hands, as King's property, could he have held on in opposition to the levy upon the ground that King owed him? I think not. He certainly could, however, if his agency conferred a lien. It is admitted, that if a principal give up a lien against the debtor, without the knowledge and consent of the surety, the surety is discharged. But what liens are meant? Judge Carr in Chichester vs Mason, 7 Leigh. Rep. 256, says, that the liens which being given up by the principal will discharge the surety are "existing, complete and perfected liens," and he regarded even a *fi fa* delivered, as not such a lien, because it was not complete until levied. Upon looking into the books for instances of sureties being discharged by the creditor, giving up liens, we find that in Alcock vs Hill, 4 Leigh. Rep. 622; Chichester vs Mason, 7 Leigh. R. 244; Ferguson vs Turner, 7 Mo. Rep. 497; Baird vs Rice, 1 Call. 18, the execution was called in. In Ashby's admr. vs Smith's admr. 9 Leigh. Rep. 164, an attachment levied was released. In State vs Hammond, C. Gill. & John. 157; Jones vs Bullock, 2 Bibb 467; Rathbone et al vs Waner, 10 John. R. 587, the execution was stayed. I can find no case, where a creditor, by becoming agent for his debtor, purchasing property for the debtor with the debtor's money, and giving up the property, lost his remedy against the surety of the debtor to a pre-existing debt; nor do I believe such a case is in existence. Upon the whole, it is very evident that Ridenhour acted for the benefit of the surety. Nothing could have been made out of King though the advice had not been given. It is not perceived that King's forfeiting the confidence reposed in him by Ridenhour, and failing to pay any of his debts altered the case. Ridenhour took the only course to get any part of his debt. He could not attach King, for it appears that he and the two Wyatts were the first to suggest to him to take his property to a better



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market and sell it and pay all his creditors *pro rata*. In this way he hoped to realise something. If King remained, he knew he would get nothing.

4. It does not appear from the copy of the record in this case, made out for my individual use, that there was any motion for a new trial. I have not seen the record filed in this court, but presume that my record corresponds with the record in court, as they were both made out by the same clerk. No motion having been made for a new trial, in the court below, the Supreme Court will not disturb the verdict for errors committed in the progress of the trial, or for erroneous instructions, therefore the judgment must be affirmed. *Higgins vs Breen*, admr. of *McNally*, 9 Mo. Rep. 501. *Stevens vs Sexton* use of *Schenck*, 10 Mo. Rep. 31. *Rhodes vs White*, 11 Mo. Rep. 623.

RVLAND, Judge, delivered the opinion of the court:

The principal point for our adjudication in this case, arises from the instructions given and refused by the circuit court. These instructions all appear in the above very full statement of the case.

We will notice those prayed for by the defendants and marked 2nd and 4th in the above statement. These instructions were properly refused. The testimony as preserved in the bill of exceptions does not warrant the giving of any instructions. The merely advising a debtor by his creditor, to carry his negroes and horses to a better market, sell them there, and return and pay his debts; and if he be unable to pay all, then pay *pro rata*, although that market be out of this State, never can be considered as a fraud upon or operate as a release to the securities of the debtor in a note to such advising creditor. There is no error in refusing these instructions, nor in giving the 4th instruction asked for by the plaintiff as marked in the above statement. These instructions bring up the same subject and are nearly the converse of each other.

No delay on the part of the creditor, will operate to release the security, which would not act as a bar for the principal. In our State, securities have the power to require the creditor to bring suit, in order to hasten the collection of the debt; and a failure or neglect to sue as required, upon proper notice, will, after the lapse of a certain number of days, operate as a discharge of such security.

There appears nothing in the testimony of this case, requiring such instructions as the defendants prayed for as above. We will pass over that objection and come to the main question, which is the statutory bar; the limitation to the plaintiffs right to recover, because he failed to present his demand within three years from the date of the letters of administration.

From the testimony, it appears that one administrator alone subscribed his name to the notice—that it was not signed by his co-administrator,

and that the letters were granted to two persons. This is also objected to, by the plaintiff as not being sufficient. We will not give an opinion on this point, as the notice is fatally defective in another important point deeming it, however, not amiss to say it is the best and safest course to have the notice subscribed by all or at least by a majority of the persons to whom the letters have been granted.

The notice to the creditors, in this case, was not published until after the expiration of the thirty days from the date of the letters. It was published on the 31st day after their date.

We hold this not a compliance with the statute; and as the law authorizing it has a tendency to destroy rights, we shall require a strict compliance with its provisions. This view of the case is not new; it has heretofore been sanctioned by this court. See *Wiggins vs. Adm'r. of Lovering*, 9 Mo. Rep. 265. We therefore find no error in the court below, giving the 1st instruction as above set forth for the plaintiff. The publication of the notice, must commence within the 30 days, from the date of the letters; but its entire publication need not be completed within the thirty days. It must, however, commence within that period. See *Montelins and Fuller vs. Sarpy*, 11 Mo. Rep. 237, and the case of *Wiggins vs. Lovering's Adm'r.* above cited. We find no error in giving this instruction or refusing the converse.

The judgment of the court in this case is wrong. It must be amended so as to be against the estate of the intestate, and not against the administrators personally. It must also be corrected so as to bear six per cent interest only, instead of ten. All judgments, under the present statute, concerning "Interest," can bear but six per cent, no matter what interest the instrument on which the judgment is founded bears. See Statute concerning Interest; Laws of Missouri, session 1846 and 7; page 63, secs. 1 and 2.

This case will be remanded to the circuit court, with directions to amend the judgment in the above particulars; in all else, it is affirmed.

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McCORMICK vs. KENYON & ROCKFORD.

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## McCORMICK vs. KENYON &amp; ROCKFORD.

If the plaintiff fails to make profert of the instrument of writing mentioned in his declaration, and which is the foundation of his action, it is a substantial defect in the declaration.

## ERROR TO BOONE CIRCUIT COURT.

RYLAND, Judge, delivered the opinion of the court :

The plaintiff, McCormick, commenced his action of assumpsit against the defendants in the Boone circuit court, by filing his declaration on the 3rd day of September in the year 1846.

The first count in said declaration, is founded upon a written agreement between the parties; yet the declaration contains no profert thereof.

The defendants, at the return term of the writ, appear and demur to the declaration. The court sustains the demurrer, and gives judgment thereon against the plaintiff as to the matters and things set forth in his first count of the said declaration.

The plaintiff then moves the court to set aside this judgment, which motion is overruled. The plaintiff then suffers a voluntary nonsuit, and moves afterwards to set it aside, which motion is also overruled.

I mention these facts as they appear on the record, on account of their anomaly.

When the defendant demurs to a plaintiff's declaration, and judgment be given on the demurrer for either party, this judgment can be renewed by this court upon the record as it stands. No motion to set aside the judgment is ever required in such a case, nor need a nonsuit be taken with motion to set it aside. The demurrer to the declaration and judgment thereon, bring up the merits of the declaration before the court.

This declaration, so far as regards the first count, is obviously defective. The instrument of writing mentioned is the foundation of the action. The agreement is averred to be in writing, and it being the cause of the suit, and its basis, and not merely inducement thereto, it should have been shown to the court; profert should have been made of it. See Practice at Law, article III. sec. 17, Rev. Code, 1845, page 811. This section declares that "duplicity or want of profert, when necessary, is a substantial objection to the declaration or other pleadings" See 23rd section of same article, page 812, requiring profert.

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This is a substantial defect. The court was bound to sustain the demurrer to the first count. This count is also very carelessly drawn. The dates and times in which the plaintiff avers he commenced work are left blank.

We will let the judgment below stand affirmed.

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The master is not responsible for the wilful and wanton acts of his slave, except where the statute has expressly provided. If, therefore, a slave feloniously kills the slave of another, the master of the slave who perpetrated the act is not liable to the owner of the slave killed for the injury he sustained by the loss of his slave.

#### APPEAL FROM CLAY CIRCUIT COURT.

#### STATEMENT OF THE CASE.

The record in this cause presents the following material fact. In September, 1848, the appellant was the owner of a slave named Anderson, and the appellee was the owner of a slave named Henry. Anderson was by law subject to work on a certain road district in Clay county, of which one Edward M. Samuel was overseer. The said overseer had notified the appellant to send his said slave to labor on said road, which he accordingly did, both on Friday and Saturday. The appellant, being over forty-five years of age, was not subject to work on roads, and was not present on either day. About eleven o'clock in the forenoon of Saturday, the slave Anderson, as well as the other laborers, were duly discharged from said road, at some point between the town of Liberty and the residence of the appellant. The road in question extends from said town by the house of the appellant to the steam boat landing of Major Turnham. The next that is seen of the slave Anderson, is at said landing, on the evening of the last mentioned day, and about twilight, he and the slave of the appellee engaged in a quarrel and fight, which resulted in the death of the latter. Thompson sues Ewing for the recovery of the damages alleged to have been sustained in the premises. His declaration is in trespass on the case, and is conceived in analogy to actions brought against owners, for injuries done by their animals of a dangerous and mischievous disposition. Ewing pleaded the statutory general issue. Upon the trial, the plaintiff below introduced testimony conducing to show that the slave Anderson was of a dangerous and murderous disposition, and that, with a knowledge of such disposition, the defendant below had negligently and unlawfully permitted said slave to go at large without his possession and beyond his control, and that while so at large he had committed the wrong complained of in the declaration. The defend-

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ant below then introduced evidence conducing to show that his said slave was not of the disposition imputed to him, and generally rebutting the former evidence. After the evidence was closed on both sides, the court gave to the jury the following instructions :

2. "If they believe from the testimony, that the boy Anderson, the property of the defendant, was in the habit of becoming intoxicated, and drinking intoxicating liquors, and when so intoxicated, was of a quarrelsome, murderous and dangerous disposition, and defendant negligently suffered said boy to go off his farm from under his immediate supervision or control, or under the immediate supervision or control of any one else ; and whilst so abroad he became intoxicated, and assaulted and killed a negro boy, the property of the plaintiff, and defendant knew of such habit of the boy Anderson beforehand, they will find for the plaintiff the value of the boy killed."

4. "If the jury believe from the evidence, that the defendant kept a negro boy Anderson, the property of the defendant, that said boy was in the habit of getting intoxicated, and when intoxicated was of a quarrelsome and murderous disposition, and the defendant knew the fact, and negligently suffered him to leave his farm ; and that said boy went to Turnham's, landing on the Missouri river on Saturday, became intoxicated, assaulted and killed a negro boy, the property of the plaintiff, then they will find for the plaintiff the value of the boy killed."

The defendant below then prayed the court to instruct the jury, as follows :

1. "That before the plaintiff can recover in this cause, he must prove the following four facts, to wit : *first*, that the defendant's slave in question, was of a murderous disposition : *second*, that such murderous disposition was known to the defendant : *third*, that with such knowledge the defendant unlawfully and negligently permitted said slaves to go at large ; and fourth, that whilst so unlawfully and negligently at large, the said slave committed the injury complained of in the plaintiff's declaration. The proof of one or any of said facts is not sufficient to authorise a recovery ; for such purpose all must be proved ; and if the plaintiff has failed to prove any or either of such facts to the satisfaction of the jury, then they will find for the defendant."

2. "That even a general, unlawful and negligent permission to go at large, will not, of itself, authorise the jury to find for the plaintiff. Before he is entitled to recover, he must show an unlawful and negligent permission to said slave to go at large at the time of the supposed injury ; and if the plaintiff has failed to prove that the defendant unlawfully and negligently permitted said slave to go at large at such time, and further, that such injury resulted from such permission, then they will find for the defendant."

3. "That if the jury believe from the evidence, that on the day of the alleged injury, the defendant was required by law to send his said slave to labor on a public road or highway, and that such injury was done while said slave was absent from the defendant for that purpose, then the defendant was but complying with the requirement of law ; and from such compliance, the jury have no right to infer that he unlawfully or negligently permitted said slave to go at large on that day."

4. "That if the alleged injury was done by the defendant's slave, in question, while he was absent from the defendant for the purpose of laboring on a public road or highway, in obedience to the requirement of law, then, for any wrongs done by said slave, while so absent, the defendant is not liable."

5. "That unless the jury find from the evidence that the injury complained of in this cause was committed by the slave in question, under the authority, or with the knowledge and approbation of the defendant, then they will find for the defendant."

6. "That the law fixing the liability of owners for injuries done by their animals, either of a wild or tame nature, is not applicable to this case, in which it is sought to make the defendant, who is master, consequentially liable for an injury supposed to have been done by his slave." The relations of master and slave are analogous to those of master and servant at the common law, rather than to those of owner and beast, and the master cannot be held lia-

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ble for wrongs done by his slave otherwise than upon the ground of an authority express or implied, except where a remedy is given against the master by statute. This suit is not brought upon any such statute, nor is it brought upon the ground of an authority express or implied. The jury are therefore bound, in any aspect of this case to find for the defendant."

7. "That although the jury may believe from the evidence, that other persons had seen the slave Anderson in circumstances, and known him to be guilty of acts indicating a quarrelsome and murderous disposition, yet, unless they also find from the evidence, that the defendant knew there was danger to the rights of others, in permitting Anderson to leave his premises and that he was disposed to commit murder and like crimes, when away from home, the defendant is not liable for the act complained of."

8. "That such acts and conduct of the slave Anderson, detailed in proof, as were never communicated to or known by the defendant, and such rumors and reports about said slave as never came to defendants knowledge, cannot affect the defendant in this trial."

The fourth, in this series of instructions, was given as prayed, and the others refused.

The court, of his own motion, then instructed the jury as follows:

1. "That before the plaintiff can recover in this cause, he must prove the following four facts, to wit: *first*, that the slave of the defendant, in question, was a quarrelsome and murderous disposition; *second*, that such disposition was known to the defendant; *third*, that with such knowledge, the defendant negligently permitted said slave to go at large, and *fourth*, that while so at large, the said slave committed the injury complained of in the plaintiff's declaration. The proof of one, or any of said facts is not sufficient to authorise a recovery. For such purpose all must be proved; and if the plaintiff has failed to prove any or either of said facts to the satisfaction of the jury, then they will find for the defendant."

2. "By the *murderous* disposition mentioned in the instructions, is meant a disposition which would prompt the negro, if unrestrained, to take the life of his fellow being, and render it dangerous for him to be permitted to go at large with other negroes; and to determine whether the negro had this disposition, they will look to all the facts and circumstances in evidence."

The first of these instructions, thus given by the court of his own motion, was in lieu of the first prayed by the defendant below as before stated. Exceptions were had to the instructions thus given upon the prayer of the plaintiff below, and to those given by the court of his own motion, as also to the refusal of the court to give those prayed by the defendant below. The trial resulted in a verdict and judgment for the plaintiff below. The appellant then moved in arrest of judgment and for a new trial, which motions were severally overruled and exceptions taken. The cause is in this court by appeal.

### EDWARDS for appellant.

1. The court erred in admitting all that part of the testimony of the witness Viotel, to the introduction of which exception was taken. 1. such testimony was but hear say and without the sanction of an oath, 2. It was irrelevant. The issue presented by the pleadings, involved the enquiry whether the slave in question was of a *murderous* disposition and habit, but his other vicious dispositions and habits were foreign to that issue, and evidence tending to prove them ought to have been excluded. The defendant below is not presumed to have come prepared to rebut evidence of facts. 1 Greenleaf Ev. 62, 205.

2. The court erred in giving the second and fourth instructions prayed by the plaintiff below. These instructions assume that it was the legal duty of the appellant to have had his slaves constantly under the supervision and control of himself or of some other person, and that for any wrong done by the slave under any negligent suspension of that supervision and control, the appellant is answerable. The other slave may have been in the wrong, either in an equal or less degree; he may even have been the aggressor; and yet if the slave of the appellant was of a *murderous* disposition, and he, with knowledge of such disposition, negli-



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gently permitted his slave to go at large, and while so at large he killed the slave of the other, then the jury must find the value of the slave killed. The Roman law held the master liable for wrongs done by his slave; but at the same time, it gave nearly as full power over the slave as the owner at common law has over his animal. By the civil law, however, the liability of the master was limited to the value of the *slave doing the wrong*; and it was always in the option of the master to pay the the estimate of the damages, or surrender the body of the slave as a recompense. If we are driven to the Roman law for the liability, let us adopt the whole of that law in reference to master and slave; as well the measure of damages as the liability. If the master's liability is to be ascertained by that law, then for his protection, give him the same power over the life and actions of his slave which that law recognizes. It then follows, that the jury should have been told, that the measure of damages was the value of the defendant's slave. Wheeler on slavery, 236. Cawthorpe vs Deas, 2 Port. Rep. 276.

3. The instructions given by the court of his own motion, are not perhaps sufficiently objectionable of themselves to demand a reversal of the judgment, but it is submitted that the first of those instructions was not called for, and presented the case in less satisfactory manner than that for which it was substituted. The case did not require nor authorize the modifications volunteered by the court.

4. The court erred in refusing the second and third instructions prayed by the defendant below.

1. The second correctly assumed the law to be that the defendant was not answerable to the plaintiff for any negligence from which the defendant had not suffered. To fix the defendant's liability, it required proof of a wrongful permission of his slave to go at large at the time of the alleged injury, and that such injury naturally resulted from that permission. 2 Greenleaf Ev. 210 sec. 256; 1 Chit. Pleadings, 428, 1 Bac. Abr. 68.

2. The third instruction naturally followed the second. It announced a rule of evidence necessary to the safe determination of the cause.

5. The seventh and eighth instructions, prayed by the defendant below, announce a rule of evidence and present the question whether the defendant was liable, without notice of his slave's alleged disposition, and ought to have been given. Put the slave on the same level with the beast, and yet the owner is not answerable without previous notice of the particular vicious propensity. 1 Bac. Abr. 118; Vrooman vs. Lawyer, 13 John. Rep. 339. 1 Chit. Pl. 91.

6. The verdict was against the instructions of the court. There is no fact in the case better proven, than that the slave, at the time of the alleged injury, was absent from his master for the purpose of laboring on a highway; and the jury were told, that in this event, the defendant was not liable.

7. The verdict is against the evidence. Besides upon general principles, the plaintiff was not entitled to damages even from the *gross* negligence of the defendant, unless the former were himself free from culpable negligence. 3 Bac. Abr. 60. So if the proximate cause of the injury were the plaintiff's own want of care. 1 Bac. Abr. 109.

8. The declaration in this cause is fatally defective. If the defendant's slave was a beast, *man suetae naturae*, and mischief resulted from his negligence, then, the remedy is care; and it must be averred in the declaration and strictly proved upon the trial that the slave was *used* and *accustomed* to do like injuries. Vrooman vs. Lawyer, 13 John. Rep. 339, 3 Black. Com. 153; Bull. N. 77, 2 Chit. Plead. 597 note. If, however, the slave was *ferae naturae*, or naturally inclined to do mischief like that complained of, then the plaintiff's remedy was trespass *vi et armis*. 1 Chit. Pl. 94. 209. Is the defendant's slave of the *harmless* or *savage* sort of *beasts*? There was no averment that he was *used* or *accustomed* to do wrongs like that now imputed to him. It is however averred, that he was of a *dangerous, mischievous, ferocious* savage and *murderous disposition and nature*. Thus, upon the plaintiff's own showing, he has misconceived his remedy, if any he had, and for that reason the judgment ought to have been arrested.

9. But the great question in this case is presented by the fifth and sixth instructions prayed by the defendant below. Is the master, in any form of action, or under any state of care answerable for the unlawful and unauthorised wrongs of his slave? It is submitted that no such liability exists, either upon principle or authority, except where it is given by statute. Upon principle,

*First*, If the master's liability for the wrongs of his slave, is to be ascertained by the rules which fix his liability for the wrongs of his animal, then for his protection, he ought to be clothed with the same power over the former as over the latter. But this he has not; for cruelty to his slave, he is indictable. Rev. Stat. 39 sec. 8, art. of the act concerning crimes and punishments.

*Second*, Such restraints upon slaves as are now urged, would render them as property wholly unproductive and worse than useless.

*Third*, Slaves with us are persons as well as property, and are so regarded and treated, both by the constitution and laws of the United States and of this State. See constitution U. S. Art. 1, sec. 2, clause 3; sec. 9, clause 1; Art. 4, sec. 2, clause 3. In this State, and in every State where slavery is recognised, they are regarded in this double aspect. As property, they are held to service and may be sold. As property, they are the subjects of bequests and descents. As persons, they are amenable to the criminal law, and are within the provisions of a criminal statute though not named. As persons, they are protected against the crimes of others, even the conduct of their master towards them, is regulated and governed by law.

Upon authority, first. At the common law, the master is not answerable for the wrongs of his servant, unless done while in his actual employ, or under his authority, express or implied. 1 Chit. Black. Com. 344 and notes, 2 Greenleaf Ev. 52.

*Second*, The courts of the United States have held the master liable for the wrongs of his slave in analogy to the common law of master and servant only. Boyce vs. Anderson, 2 Pet. Rep. 155; Clark vs. McDonald, 4 McCord's Rep. 223; Wheeler on slavery p. 1, 2 Murphy's N. C. Rep. 389; Wings vs. Smith, 3 McCord's Rep. 400; Wheeler on slavery 230; The State vs. Francis Anone, 2 Nott & McCord, 27; Snee vs. Trice, 2 Bay's Rep. 345; State vs. Dawson, 2 Bay's Rep. 360; Wheeler on slavery 282; Cauthorne vs. Deas, 2 Post. Rep. 276; Wheeler on slavery, 236; 7 Smeade's & Marshall's Rep. 348; 2 Sup'l. U. S. Dig. 387, 7 Yey. 367.

*Third*, Our legislature has enacted, that for various wrongs done by slaves, their masters shall be civilly answerable to the party injured. Rev. Stat. 414, sec. 35. The statute evinces the legislative understanding, that by the common law, the master in such cases would not be liable. It is strictly remedial, giving a right of action where none previously existed. The suit at bar is not brought upon that statute, nor will it be pretended that the case comes within its provisions. Thus we have an appropriate subject for the application of the maxim, *expressio unius est exclusio alterius*. But this very case, in all its length and breadth, its height and depth, has been determined by this court. Jennings vs. Kavanaugh, 5 Mo. R. 26.

### LEONARD, for appellee.

1. Whoever occasions another any damage, in any manner, through his omission to do what he ought to do, or through his negligence in doing what he lawfully may do, must answer for the injury.

2. If a man have authority over another, and either expressly commands him to do an act, or puts him in a condition of which such act is the result, or by the absence of due care or control, negligently suffers him to do an injury, he is responsible for the act, as if it were his own act. Wayland vs. Elkins, 3 Eng. C. L. R. 84, note. Dixon vs. Bell, in note to 3

Eng. Com. L. R. 84; *Littledale vs. Lansdale*, 2 H. Black. R. 267; *Bush vs. Strenman*, 1 Bos. & Pul. 404.

3. Under our law, a master has dominion over the person of his slave, except so far as the law expressly restrains him. (*State vs. Mann*, 2 Dev. N. C. Rep. 263; cited in *Wheeler on slavery*, 245) and by the civil law, and also by the law of Louisiana, is liable for every wrong done by his slave, without any reference to his own conduct. (*Cooper's Justiman*, 354, 357; *Puffendorf*, book 3, p. 6; 1 *Domat*, 305; *Gurrier vs. Lamberth*, 9 Louisiana Rep. But, although this is otherwise here, (*Jennings vs. Kavanaugh*, 5 Mo. Rep. 26; *Rev. Stat. of '45*, page 414, sec. 35,) he is yet liable for the acts of his slave, upon the same principle and to the same extent, that the law subjects him to liability for the acts of those over whom he has control; and this is the principle on which the case was submitted to the jury, and the verdict found.

NAPTON, J., delivered the opinion of the court.

This action was brought to recover the value of the plaintiff's slave, who had been killed by a slave of the defendant's. The declaration contains five counts. The first count is in trespass for assault and battery, and has no support in the facts proven on the trial. The other four counts are varied forms of the same charge, and the substance of the charge is, that the defendant was the owner of a slave, who had a ferocious, murderous and mischievous disposition—that this slave, when suffered to go at large, was in the habit of beating and wounding other slaves—that the defendant knew of this propensity, and habit, and negligently permitted the slave to go at large—and that the slave, whilst so at large, wantonly and wilfully killed the slave of the plaintiff.

Various questions arose in the course of the trial, upon which errors have been assigned here, but our opinion upon the main question renders it unnecessary to notice the minor points of this case.

It will be readily seen, that all the various forms in which this action has been couched, depend upon the same hypothesis. They all assume as a principle of law, that the responsibility of the owner of the slave for the wilful wrongs of that slave is, at least as extensive as his responsibility for the injurious acts of his dog or his ox.

We understand both the municipal and moral law to be different. We understand the slave to be a responsible moral agent, amenable, like his master, both to the laws of God and man for his own transgressions—that the law which regulates our dominion over the brute creation is not the one which governs the relation of master and slave—that our municipal laws have not given to the master that absolute dominion over his slave which would enable him absolutely to prevent the commission of crime, and that the moral discipline which the law has entrusted to him, with a view to the prevention or reformation of bad habits, is but a

modification or perhaps extension of that authority which is given to the parent over the child, or the master over his servant. The power of the master being limited, his responsibility is proportioned accordingly. It does not extend to the wilful and wanton aggressions of the slave except where the statute has expressly provided.

This seems to be the view of the relation between master and slave, in all the states of the Union where slavery exists, excepting Louisiana where the civil law on this subject has been adopted, and possibly in some other states, as in this State, some slight modifications of the principle have been made by the State legislatures. We know that by the civil law, the responsibility of the master was more extensive; but we know also, that his power over the slave was much greater. With the comparative merits of the two systems we have, however, no concern. Any changes which may be thought desirable, are of course entirely with the legislature, and it is not our province even to suggest any. Certainly it would seem to be but just, if the responsibility which the civil law imposes upon the master is to be introduced in our code, the limits of that responsibility should also be fixed as it is in that code. The master was not held answerable in damages beyond the value of his offending slave. So our statute, where it has adopted this principle in certain cases, has in the same way limited the liability of the master.

It is quite obvious, that if it was deemed advisable to extend the responsibility of slave owners to cases like the present, such responsibility would not be based upon any assimilation of the slaves to irrational animals, but would be made entirely independant of the circumstances which were thought necessary to be averred and proved in the case now before the court. The existence of a ferocious and murderous propensity in the slave, and the *scienter* of the master are both averred in this declaration, and in fact constituted the very gist of the action. How was this to be proved? If we look at the record, we see there was no evidence on the subject. What is meant by this murderous propensity when asserted to exist in a rational being? Is it merely that recklessness of human life which is too often found, when the passions are aroused, or is it such a thirst for blood as characterizes a beast of prey and which, when found in a human being, might be fitly pronounced an index of insanity? If such a propensity as this can exist in a responsible human being, how are its effects to be guarded against by the master? He is not entrusted by our laws with the power of life and death, nor can he confine a slave as he might a vicious beast. Our statutes have defined the duties of a master towards his slave so far as they con-

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cern the public welfare, but it is not alleged in this case that any of these duties were neglected, or that any breach of our laws was committed. If it even were so, the master would only be liable to the penalties prescribed in the law. He could not be held responsible for such remote consequences as the murder of another slave, should such a consequence be traced to a laxity of discipline not tolerated by our laws.

The judgment of the circuit court is therefore reversed.

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### KENNETT et al vs. COLE COUNTY COURT.

The title of the State of Missouri to the 16th sections granted by the act of Congress of March 6, 1820, for school purposes, is not impaired or destroyed by the *previous* location of a New Madrid certificate upon these sections.

#### APPEAL FROM COLE CIRCUIT COURT.

#### EDWARDS for appellants.

By the 6th section of the act of Congress authorizing the people of Missouri Territory to form a State government, sundry propositions were submitted by Congress to the people of said territory, in convention, for their acceptance or rejection. One of these propositions was, that section numbered 16 in every township, and when said section had been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as might be, should be granted to said State for the use of the inhabitants of said township, for the use of schools. This proposition was accepted by the people in an ordinance reciting the identical language used in the act of Congress, subsequently adopted by the people. See. Rev. Stat. 1845, page 20 sec. 6—also page 23, ordinance declaring the assent of the people to the propositions submitted by Congress.

The appropriation of the 16th section to school purposes was a matter of contract between Congress and the people of the State, and was conditional in its nature. Congress agreed to give and the people to receive the 16th section for school purposes; but there was coupled with this gift a qualification or reservation. This qualification or reservation was, that if the 16th section had not been sold or otherwise disposed of, then the inhabitants of the township were to have it for school purposes. If it had been disposed of, other lands were to be selected in lieu thereof for the use of schools. There are two contingencies under which the right of the inhabitants of a township to the 16th section may fail. The one is, where the 16th section was sold at the time the propositions of Congress were accepted by the people. The other, when said section had been otherwise than by sale disposed of at the ratification of said propositions. From this it is manifest, that neither Congress nor the members of the



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convention, considered the right of the inhabitants of the township absolute and paramount to all other titles thereto; but, on the contrary, admit that there may be better titles by providing a remedy for such cases.

Was this 16th section disposed of at the time the propositions submitted by Congress were accepted? If it was, then the inhabitants of that township had no right thereto. The county court of Cole county had no right to sell the same. The purchaser acquired no title by virtue of a purchase at such sale. The bond given for the purchase money was void for want of consideration and should be cancelled and given up to the complainants; and the circuit court erred in refusing to decree according to the prayer of the complainants. If the 16th section had not been sold, or otherwise disposed of, the judgment of the circuit court was right. Upon this point the case turns.

It is contended by the appellants, that the United States government had disposed of this 16th section before the acceptance of said propositions referred to, and that all her title was in Patterson under the act of Congress for the relief of the inhabitants of New Madrid. Patterson's certificate was issued on the 4th of Dec. 1816, was located on the 30th of January following. The claim was surveyed on the 12th of May 1819 and a plat of the survey was forwarded to the general land office on the 6th of January 1820. Thus it will be seen that Patterson had performed every act which was required of him, or which he could perform to make his title good before the passage of the act of Congress submitting said proposition to the people of the then territory of Missouri for their acceptance or rejection and consequently before the acceptance thereof by the people. The land, then, had been disposed of, and inhabitants of the township had no title to the 16th section, and their remedy and their duty was to have selected other lands in lieu thereof. If there had been a doubt as to the correctness of this position, that doubt is removed by the issuing of the patent to Patterson. This patent was issued when all the facts and circumstances were fresh and well understood, and unless that patent was obtained through fraud, or under circumstances not warranted by law, it was conclusive. It is submitted that the validity of the patent cannot be called in question under a demurrer. Whether properly or improperly issued is a fact which should be tried upon a proper issue between the parties.

It is admitted that it has ever been the policy of the government to encourage common schools by donations of lands for that purpose; but this is not and should not be done by sacrificing the rights of private individuals.

All the acts of Congress reserving the 16th section from sale, for school purposes, make the reservation take effect *after* the survey of the land not *before*. It is a reservation from sale and not a donation or grant. There is no grant of the lands until the passage of the act of Congress above referred to. If it be necessary, to make the reservation good, that the lands should be surveyed, then this settles the question, for Patterson's survey was made long before the survey of the lands. Statutes at Large, vol. 2, page 620, § 10.—Act of Congress March 1812, organizing a Territorial Government in Missouri, sec. 14—Stat. at Large, vol. 3, 407, sec. 3.

**STRINGFELLOW, Att'y. Gen'l. for the appellee.**

Sections 16 in each township have been reserved from sale by the United States since the purchase of Louisiana. Their sale never having been authorised by law, a New Madrid claim could not be located on them, and if such location has been made it is void. 2 Howard 317. Laws of United States.

**NAPTON, J., delivered the opinion of the court.**

This was a bill in Chancery by the administrators and heirs of J. M.



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White, to cancel a bond given by the decedent to the county of Cole for the consideration of a portion of the 16th section in township 44, range 10.

The grounds of complaint are that the county had no title. The objection to the title is, that in 1816, a New Madrid certificate was issued in favor of one Patterson, and located upon said land in January, 1817; that a survey was made in 1819, and that the plat of survey forwarded to the Recorder on the 6th January, 1820. A patent issued to said Patterson, May 7, 1822.

A general demurrer was filed to this bill, which was sustained, and the case was brought here by appeal.

The only question necessary to be determined is, whether the title of the State to the 16th section, granted by act of Congress in 1820, is in any respect impaired or destroyed by the previous location of a New-Madrid certificate upon these sections.

A reference to the land laws of the United States will show, that it has been the policy of the government, from the very commencement of its system of disposing of the public lands, to reserve the sixteenth section of each township for the use of schools. This was done in the laws for the disposition of the lands in the North-West Territory, and subsequently in the Territory of Orleans, and was adopted in the first act which authorised the sale of land in the territory of Louisiana. The act of March 3, 1811, which authorised the President of the United States to cause these lands to be surveyed and sold, excepted from its operation the section numbered sixteen, which the act declared "should be reserved in each township for the support of schools within the same."

The act for the relief of the sufferers by earthquakes at New-Madrid was passed in 1815. That act authorized those persons who were objects of the bounty of Congress to make their locations upon any of the public domain which was authorised to be sold. The sixteenth sections were not lands of this description; they were not authorised to be sold, but expressly reserved for the use of the inhabitants of the townships.

The act of Congress of March 6, 1820, for the admission of Missouri into the Union, provided "that section numbered sixteen, in every township, and, when such section has been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of the inhabitants of such township, for the use of schools." The propositions contained in this act of Congress

were accepted by the people of Missouri during the same year, and so declared by an ordinance of their convention. The grant of the sixteenth sections to this State became thereby unconditional, except where they had been previously sold or disposed of. The patent upon Patterson's certificate of location, did not issue until 1822. Assuming the location made in 1817 to have been merely voidable, yet Congress vested the title in this State in 1820, and prior to the issuance of the patent to the holder of the New-Madrid certificate. The State had then the older legal title, and the purchaser of this title must prevail over the title acquired in 1817 under the act of 1815, for the relief of those who suffered at New-Madrid.

But under the late decisions of the supreme court of the United States this question could hardly admit of discussion. That court has given a construction to the act of Congress of July 4, 1836, confirming certain Spanish claims therein mentioned, which applies with increased force and pertinancy to the act of March 6, 1820. The former act spoke of sales and *locutions* and exempted them *in terms* from the confirmation. No sales or locations could have been made in reference to the lands embraced in that act, except such as were at least voidable, and perhaps void; and the only object of the law in protecting any sales or locations was to protect such as were involved and would have been lost without such protection. As all the lands embraced in the act had been duly claimed, and the claims filed in the Recorder's office, and consequently were all embraced in the provisions of the act of 1811, which reserved them from sale, there was nothing left for the act to operate on. The act of 1820, is different in phraseology and intent. Titles may have existed prior to the act of 1811 which first reserved the sixteenth sections from sale titles acquired under another government. It was proper that Congress should provide other equivalent lands for the inhabitants of the townships where this was the case.

But if a New-Madrid location patented long prior to 1836 be of no validity as against a confirmation under the act of Congress of that year, it must follow that such location, patented subsequent to 1820, cannot prevail against a grant to the State of Missouri by the act of Congress of March 6, 1820.

We think the demurrer was properly sustained, and the judgment is therefore affirmed.

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 PETER (of color) vs. KING, Adm'r. of EVANS.
 

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### PETER (OF COLOR) vs. KING, ADM'R OF EVANS.

When the affidavit required, by the administration act, of a claimant presenting a demand against an estate for allowance, is made by an agent it must appear from the affidavit itself that the agent had "the management and transaction of the business out of which such demand originated," or that he "had the means of knowing personally the facts required to be sworn to."

#### ERROR TO OSAGE CIRCUIT COURT.

##### ROBARDS for plaintiff in error.

The first point which presents itself is as to the legal ability of the plaintiff to maintain a suit for services rendered the estate during the contract about the validity of the will of Evans. If his freedom commenced from the death of the emancipation, he had a right to sue and recover his legal demands from that day. I know no rule of law better established than that a testator, in reference to every thing except real estate, is presumed to speak at the time of his death. In 4th Dana, page 188, the court, in commenting upon a case in almost every respect similar to the present, says, that "the person emancipated is a free man from the time of the testator's death. His (the testator's) will, then, operated for every purpose for which it could ever be effectual. The subsequent probate was only necessary as evidence of its existence and legal validity." It is true the third section of the emancipation act of this State, (Digest, 1845, page 1019) makes emancipated slaves liable to be taken in execution to satisfy debts contracted prior to the emancipation. This provision cannot be construed to prolong the time of servitude. It means that a slave emancipated according to the two preceding sections of the act, may, for the purpose of satisfying debts, again be reduced to a state of servitude. Williams on Ex. 1031; Tucker Com. 1 page 303, and authorities there cited; 4 McCord, 39, case of Elcock's will, 1st J. J. Marshal, 17, 4 do. 103.

The second question is whether the county court has jurisdiction to hear and determine a demand against an estate, accruing after the death of the testator or intestate. See act to establish Courts, Digest, page 331, sec. 13; act concerning administration, art. 5, sec. 9 and 10, Digest, pages 97 and 8; Digest, title "Justices' Courts," sec. 4, page 635.

The plaintiff, if he had a right to sue, and to sue in the probate court, sets forth facts in his affidavit, which would entitle him to sue as a poor person, and consequently to pursue all remedies, either by appeal to a superior court or otherwise, to establish and secure his rights. If he had a right to sue as a poor person in the probate court, he had a right under the law to appeal to the circuit court, if he deemed an appeal necessary to secure his rights. See act concerning costs in civil cases, sec. 4, Digest, page 241.

##### EDWARDS for defendant in error.

1. Peter was a slave belonging to the estate of Evans at Evans' death. His right to his freedom depended upon the validity of the will; if the will had been declared void, he would have remained a slave. He acquired no rights under the will until it was admitted to probate and established according to law; consequently he was a slave at the time the services, for which claims were rendered, and as such his services belonged to the estate, and he is not entitled at law to recover for the same. See Rev. Code, p. 1019, art. 3, sec. 1; same 533, sec. 14.

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2. Peter's rights all arise under the will, while the will was in the possession of Evans, during his lifetime, he had the right to alter it at any time, so as to deprive him of his freedom, and Peter would have remained a slave. If the will had been declared void upon the contest, Peter would have remained a slave; as much so as if the will had never had an existence. The will was not perfected until it was probated, and consequently Peter's right to freedom was not perfect, or rather, he had no right to freedom until the will was made perfect by being admitted to probate. If the positions assumed above be correct, Peter clearly had no right to sue, and the case was properly dismissed by the circuit court.

3. But admit that this position is incorrect, and still Peter cannot maintain this suit. The account purports to be a claim against the estate of Evans for services rendered after the death of Evans. Most clearly Evans never contracted any such debt with his slave, and if any contract was made, it was with some other person, and that person, if any body, but not the estate of Evans is liable to Peter. If the services were rendered voluntarily, no principle of law is better settled, than that he cannot in this way make the estate his debtor. It is contended, however, that this is a claim properly rendered against the estate of Evans. How this can be it is difficult to see. The account is for boarding, clothing, &c., of certain slaves said to belong to the estate. Who had the right to contract any such debt on the credit of the estate? Not the administrator, unless by order of the probate court. The only ground upon which such a claim could be properly based, would be that it was for expenses necessarily incurred in administering the estate. This, at best, would but make a claim against the administrator, as between him and Peter, which, when paid by the administrator, would be a claim in his hands to be submitted by him for allowance in the settlement of his accounts.

But if this is a claim for which the estate of Evans is liable, still the case was properly dismissed, because no sufficient affidavit was made to the account. The 9th section of the 4th article of the statute concerning executors and administrators, Rev. Code of 1845, page 92, prescribes the affidavit to be made by persons having claims against estates, before the probate court is authorized to allow such claim. The 11th section of the same article makes provision for the making of the affidavit required by the 9th section, by an agent in cases therein specified. McCampbell, who makes the affidavit accompanying this account, does not bring himself within the provisions of that statute, and to allow an affidavit to be made under such circumstances, would be to defeat the object of the law. The affidavit of McCampbell is a nullity. Indeed it is difficult to find an excuse for McCampbell in making the affidavit. So far as the record shows, Peter may have received full satisfaction for any claim he might have had against the estate, if he ever had any, and there is nothing to show that the suit is prosecuted by his authority.

4. The plaintiff made no motion for a new trial, and gave the circuit court no opportunity to correct any error it may have committed, and this court will not review a judgment of the circuit court, unless there is a motion for a new trial. See 11 Mo. Rep. 624; Rhodes vs. White, and the cases there cited.

5. No exception was taken to the opinion of the court during the progress of the cause as required by the statute. See Rev. Code, 1845, page 820, sec. 25, and Mo. Reports, *passim*.

NAPTON, J., delivered the opinion of the court.

The plaintiff, an emancipated slave under the will of Jesse Evans, deceased, brought a suit in the probate court of Osage county *in forma pauperis*, against King, the administrator of Evans, to recover the value of certain alleged services performed by Peter, during the contest about Evan's will.

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In the probate court, the writ was dismissed, and an appeal taken to the circuit court, by one James McCampbell, who professed to be Peter's agent, and who had made an affidavit in that capacity, before the probate court. The entry of this oath in the record of the probate court is as follows: "And now comes the said plaintiff, by his agent James McCampbell, and makes his oath that it is—wish to sue as a poor person, and that all credits have been given to the estate of said Jesse Evans, deceased.

The motion to dismiss, was renewed in the circuit court, for various reasons :

1. Because it is apparent from the record filed, that the said plaintiff is not entitled to sue nor to recover, for the services alleged by him to have been rendered to said estate.

2. Because the plaintiff has not made the affidavit required by law, for the allowance of demands against an estate.

- 3, 4, 5 and 6, same objections in substance.

The motion was sustained, and an exception taken.

Our statute concerning the administration of estates requires the claimant, who has a demand against an estate, to make oath in open court, or file an affidavit, that he has given credit to the estate for all payments and set offs. The statute permits this affidavit to be made by an agent of the claimant, when such agent has had the management and transaction of the business out of which such demand arose, or when such agent had the means of personally knowing the facts required to be sworn to. There is nothing in this record to show that McCampbell was an agent of the plaintiff, or that he had the management of the business from which this demand sprung, or that he had any means of knowing any thing about it. For aught that appears, the contrary may have been established to the satisfaction of the circuit court. It is therefore manifestly impossible for this court to see that the circuit court improperly dismissed the case. In the absence of all proof either way, the presumption is in favor of the propriety of the disposition which that court made of the cause.

Judgment affirmed.



S. &amp; W. WILSON vs. HUSTON.

## S. &amp; W. WILSON vs. HUSTON.

1. If an endorser of a negotiable note, with a knowledge of the failure of the holder to make a demand upon the maker or acceptor, makes an unconditional promise to pay; or acts in such way as to show an acknowledgment of his liability, with a full knowledge of his discharge from his responsibility by the laches of the holder, such acts are an implied waiver of due notice of a demand upon the maker or acceptor.
2. What facts will excuse notice of a demand upon the maker or acceptor of a negotiable note, or amount to a waiver of such notice is a question of law for the determination of the court.

## ERROR TO COLE CIRCUIT COURT.

## HAYDEN, for plaintiff, in error.

1. The court erred in refusing to give and declare the law of the case to be as moved by plaintiffs in each, all and every of their said instructions, which were rejected by the court.
2. The circuit court erred in the said three instructions, voluntarily given by the court.
3. The finding of the court was against law and evidence, and the court erred in refusing to set aside the non-suit and to grant plaintiffs a new trial of the cause under the circumstances of the case.

## ABELL &amp; STRINGFELLOW, for defendant in error.

1. The evidence as to the irrelevancy of the maker of the note sued on was immaterial, the note being negotiable.
2. To make the endorser liable, a notice of demand and non-payment must be shown, or it must appear that the endorser having no notice, with a full knowledge of his rights, afterwards promised to pay the debt.
3. The only evidence in this case, even remotely bearing upon this point, is that of Smallwood. He testifies that nine months after the assignment, and three months after the note became due, and a demand should have been made, the defendant, as agent for the plaintiffs placed the note in his hands for suit; that a receipt was given to the plaintiffs and a suit, brought in their name by Smallwood, as the attorney, under the directions of defendant as agent for plaintiffs. There is no pretence of any promise by defendant, even impliedly, to pay the debt. There is no evidence of any means used by defendant to secure himself or in any manner to interfere as a party interested in the matter; much less of any waiver of his rights or of any promise to pay with knowledge of his rights.
4. If the question of notice and waiver of notice be held to be a question of law, the circuit court has properly decided the law by refusing the 9th instruction asked by the plaintiff.
5. The bill of particulars and the assignment both hold the plaintiffs to their remedy upon an assignment made before the maturity of the note. The bill of particulars alleges an endorsement on or about the 22d of May, 1843. The note was due on the 1st. of September, 1843, and the endorsement is without date.
6. There is no pretence of evidence that defendant ever saw the note from its endorsement in May, until on the 27th of December 1843, four months after its maturity, when, as agent, for plaintiffs, he placed it in Smallwood's hands for suit.

Baily on Bills, 137; 8 Wend. 600; 5 Mass. 339; Story on Bills, 318, '19, '20; 12 Mass. 32; 7 do. 419, '83; 9 do. 483; 4 do. 341; 8 Pick. 1; 17 do. 332; 4 Watts & Serg't. 328.



NAPTON, J., delivered the opinion of the court.

This was a suit against Huston as endorser of a negotiable note, made payable to him by J. W. and P. L. Smith. The case was submitted to the court without a jury. Upon the trial, the plaintiffs read the deposition of one Smallwood, who stated that some time in December, 1843, the defendant Huston, placed in his hands for collection the note sued on, for which the witness gave his receipt; that said Huston stated, that he had transferred the note to the plaintiffs; that the makers of the note resided in Ray county; that the witness (who was a lawyer) immediately instituted suit against the makers in the Ray circuit court, and obtained a judgment; that this suit was conducted from the beginning to its termination, under the direction of said Huston; that said Huston and the deponent boarded at the same house in Lexington, and had frequent conversations concerning said suit; that Huston had full knowledge of the manner in which said suit was conducted, and of every step taken in its progress. The deponent was under the impression, that Huston communicated to him as a reason why he undertook to have said note collected, that the makers were in a failing condition, and he apprehended a loss, if any delay occurred. The deponent further stated that he had no conversation with the Wilsons, (plaintiffs,) or either of them, touching the note or suit, during its progress. The receipt which this witness executed to Huston, when he received the note for collection is as follows: "Received from Messrs. S. and W. Wilson for collection, by the hands of James Huston, a note drawn by Jas. W. and P. L. Smith, for the sum of one hundred and fifty dollars, payable twelve months after date, dated Sept. 18, 1842, bearing interest from date, at ten per cent, drawn payable to Jas. Huston, and by him assigned to S. and W. Wilson. Dec. 27, 1843. L. W. SMALLWOOD."

This was the only evidence in the case touching the question of notice or waiver of notice on the part of Huston.

The plaintiffs asked thirteen instructions, most of which were refused. The court declared the following to be the law applicable to the case: "The law of this case is, that if the plaintiffs have not given sufficient evidence to show that the note in controversy was endorsed at a different time from that stated in their bill of particulars, it ought to be considered as true that said note was endorsed at the time mentioned in the bill of particulars. If the note in question was endorsed before its maturity, the defendant was entitled to notice of the non payment thereof by the makers within a reasonable time after such note had been pre-

sented and payment refused. If the note in question was endorsed before its maturity, the plaintiffs in order to relieve themselves from the necessity of giving notice to the defendant of the non payment thereof, must show a waiver of the right on the part of Huston, either express or implied, to demand such notice, or a promise to pay such note after its dishonor with a knowledge of the facts of its presentment for payment, and dishonor or failure of plaintiffs to present such note for payment."

The court also gave the 4th, 5th, 7th and 8th instructions as requested by the plaintiff, which were as follows:

4th. "If the court find from the evidence, that at the time the note was assigned by the defendant to the plaintiffs, it was the understanding or agreement between them, that the defendant was to collect the money therein specified for the plaintiffs, and that the defendant to that end caused the suit to be instituted in the Ray circuit court, and prosecuted the same to judgment, execution &c., as set forth in said record, and proceedings of the Ray circuit court, which was read in evidence by the plaintiffs, and failed to collect the same as therein specified, then the court ought to find for the plaintiffs."

5th. "If the court find from the evidence, that it was the agreement or understanding between the plaintiffs and defendant, at the time the defendant assigned the note of the said Smiths to them, that he was to collect the money therein specified for said plaintiffs, then it was not necessary that the said plaintiffs should have given to said defendant notice of the non payment thereof, to them the said plaintiffs, even though the court shall find that the note was assigned before the money therein specified, became due."

7th. "If the court find from the evidence, that the defendant assigned said note to the plaintiffs as alleged in the declaration, and further find that the plaintiffs in their bill of particulars of their claim and demand filed in this cause and for which this suit is brought, have stated or specified therein that the said note was assigned and endorsed by him said defendant to said plaintiffs, on or about the 22 day of May 1843, as specified in said bill of particulars, that such statement of the particular time of the said assignment of the note does not require the plaintiffs to prove the assignment was made precisely as so stated, but they may prove that the note was assigned at a time subsequent or prior thereto."

8th. "The fact that the written endorsement of the said note to the plaintiffs, as read in evidence to the court, has no date thereto, is no evidence that the note was assigned by defendant to the plaintiffs before the money therein specified became due."

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S. & W. WILSON vs. HUSTON.

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The plaintiffs objected to the instructions given by the court and took a non suit. After an unsuccessful motion to set this non suit aside they appealed.

It is well settled, that if an endorser, with a knowledge of the failure of the holder to make a demand upon the maker or acceptor, makes an unconditional promise to pay, or acts in such a way as to show an acknowledgment of his liability, with a knowledge of the facts which would exempt him, such declarations and acts are an implied waiver of due notice of a demand upon the drawer or acceptor. These declarations and acts amount to an admission of the party making them, that the holder has a right to resort to him on the bill, and that he has received no damage for want of notice. *Rogers vs Stephens*, 2 J. R. 713. *Thornton vs Wynn* 12 Whea. 183. *Hopkins vs Liswell*. 12 Mass. R. 53.

Mr. Bayley remarks in his 'Treatise on Bills (ch. 9, 406,) that under an allegation of notice it may be questionable whether evidence can be given to excuse the want of notice, or whether, to let in such evidence, *the facts*, to excuse notice, *should not be specially pleaded*. If this conjecture be well founded, it establishes the proposition that what facts will excuse notice or amount to a waiver of notice must be a question of law for the determination of the Court. And this opinion, with some deviations in practice, seems to be the one generally adopted. *Smith's Lea. cases* 242. U. S. Dig. Tit. Pron: notes p. 618 ch. 16.

The instructions given by the Court at the instance of the plaintiffs were based upon this understanding of the law, and those given by the court of its own accord, so far as they went, were not inconsistent with this principle. Those instructions have not been objected to and so far as we can discover are unobjectionable. The only ground upon which the plaintiffs could be justified in taking a non suit, with any expectation that this court would set it aside, must be found in the refusal of the court to give certain instructions asked by the plaintiffs. These instructions I have not embodied at length in the statement, because they contain a palpable and fatal defect which can be explained without reference to their phraseology or minute details. The 1st, 2nd, 3rd, 6th, 11th, and 12th instructions called upon the court to declare that certain facts, about which there was testimony, *conduced* to prove or establish certain other facts, and that from these facts the court *might* find a verdict for the plaintiffs. Instructions of this character can only amount to comments upon the testimony, and are a plain encroachment

upon the province of the triers of fact. They are only calculated to mislead where they are given to juries, and totally unnecessary where the court itself has been called upon to assume the settlement of both the facts and law of the case.

The 9th instruction is as follows: "That if the court find from the evidence, that the said defendant procured the said Smallwood to institute and prosecute said suit in the Ray circuit court, upon said note, after said assignment thereof, to judgment execution &c, as deposed to by said Smallwood, and is specified in said record and proceedings read in evidence by plaintiffs, then the court ought to find that the said defendant either had due notice of the non payment of the money in the note specified by the makers thereof, or that the said defendant had waived his right to demand or require such notice of the non payment thereof from said plaintiffs."

This is manifestly a *non sequitur*. There are circumstances and facts not alluded to in the instruction, which would control the liability of Huston upon the hypothesis stated. He may have taken the note as a mere agent for collection, and without considering himself as having any personal interest in the result. He may have taken it after it was due, and after his release had resulted from the failure of the plaintiffs to make a demand upon the Smiths. In either event he was no longer responsible, and his acting as agent for collection, either *ex gratia* or for reward, would not revive his liability. On the other hand, there are circumstances which might establish his liability. If Huston and the plaintiffs resided in the same town, and the former did not follow the business of collecting, the language attributed to him by the witness Smallwood, when pressing the suit against the Smiths, would go very far to show a knowledge on the part of Huston of the want of demand and an admission of his continued liability notwithstanding such laches. This would be a fact for the jury. The evidence in the case was meagre, and the apprehensions of the plaintiffs and their unwillingness to let the case go to a verdict, seems to have resulted rather from the meagreness of the evidence than from any failure on the part of the court to declare the legal principles upon which the verdict was to depend. Indeed it is not by any means apparent, that the plaintiffs were bound to lose a verdict. It was for them however to risk the case or not, as they preferred.

The 10th instruction was, that upon the facts given in evidence the plaintiffs were entitled to a verdict. This was not so as a proposition of law, although such might have been the result.

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HENDERSON vs. HENDERSON'S Executors.

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These are all the instructions refused, and as we can discover no error in declining to give them, the non suit must stand.

Judgment affirmed.

Ryland, Judge. I do not concur in this opinion.

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HENDERSON vs. HENDERSON'S EXECUTORS.

1. In an action upon a covenant of seizin, as the damages are regulated by the real amount of the purchase money, parol evidence is admissible to prove a different amount from that mentioned in the deed. But in cases where the operation of a deed, in respect to the *interest* or *estate* purporting to be conveyed is sought to be effected, parol testimony is not admissible.
2. In an action for a breach of covenant against incumbrances, the amount of damages depends upon what the covenantee has been compelled to pay to extinguish the incumbrance; and evidence as to the real consideration of the deed is not relevant to this issue.
3. Parties and privies cannot allege their own fraud as a ground for varying or avoiding a deed.

## APPEAL FROM PLATTE CIRCUIT COURT.

HAYDEN & TODD for appellants.

1. Dower of the grantor's widow, is an incumbrance covenanted against by a general warranty deed. 4 Mass. R. 629; 10 do 313; 22 Pick. 447.
2. The damages in such case is the amount paid for the dower; *ibid* and 7 John. R. 358.
3. If the deed was made with fraudulent interest, neither the grantor nor his representatives can avoid it. 2 Bibb. 91; 4 do 65.
4. The return of a deed to grantor, or its destruction cannot avoid the deed. 4 Wend. 474.
5. The defendant's evidence should have been rejected and instructions of defendant refused. The acknowledgment made in the deed of payment of the consideration, cannot be contradicted by the grantor or those claiming under him, for the purpose of destroying the effect of the deed. 16 Wend. 460; 2 Hill, 554; 4 Cow. 427; 7 Johns. 341; 2 J. J. Marsh. 420; 3 do. 167; 1 Binney, 518, 19; 1 Shep. 216; 3 Shep. 118; 2 Harring, 501; 5 Porter, 498; 2 Bibb, 71; 15 Wend. 518; 4 Bibb 65; 5 Wend. 474.

NAPTON, J. delivered the opinion of the court:

Perman Henderson brought an action of covenant against the execu-



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HENDERSON vs. HENDERSON'S Executors.

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tors of his father, John Henderson, upon a deed of bargain and sale executed by the latter to the former, conveying a certain tract of land in Platte County. The deed contained the words "grant, bargain and sell," and a covenant of general warranty. The receipt of \$766, the consideration of the sale, was acknowledged in the deed.

The breach of covenant assigned was the incumbrance of the dower of John Henderson's widow (the said John having died after the execution of the deed,) and this incumbrance was alleged to be worth two hundred dollars, which was accordingly paid to the said widow by the plaintiff.

Upon the trial the defendant introduced evidence, the tendency and object of which was to prove that there was no consideration passing from John Henderson to his son the plaintiff for this conveyance—that in reality it was merely designed to remove an obstacle which the retention of the title by the father was supposed to present to the allowance of a pre-emption which he had in view—and that upon the accomplishment of this purpose, it was understood and agreed by both parties that the deed should be cancelled or the title reconveyed. To this evidence the plaintiff objected; but it was permitted to come in and the plaintiff took an exception to the ruling of the court.

Instructions were given, but they are not preserved on the record. The defendant had a verdict and judgment.

The only question which the record presents is the one growing out of the admission of the defendant's testimony.

How far the ordinary clause in a deed, acknowledging the receipt of the consideration money, ought to preclude all parol evidence to show the real consideration, either as to amount or character, is a question upon which the decisions have not been uniform. Where the action is such that the amount of purchase money paid becomes material, and the deed is not otherwise called in question, a majority of the American cases will be found in favor of the admissibility of such evidence. Such proof has usually been allowed in actions for the purchase money—tho' in the courts of North Carolina a different practice has been rigidly adhered to. So in actions upon a covenant of session, as the amount of damages must depend upon the real consideration paid for the land, the formal receipt in the conveyance has not been considered conclusive. *Moore vs. Shatluck*, 4 N. H. 229. But where the operation of the deed, in respect to the interest or estate purporting to be conveyed, is sought to be effected, such testimony is inadmissible. If the object of the testimony be to alter the effect of the deed in any other particular except the mere receipt, it cannot be admitted.



## HENDERSON vs. HENDERSON'S Executors,

In the present action, the amount of the consideration and the fact of its payment or non payment, were matters entirely immaterial to the issue. In an action upon a covenant of seizin, the damages are regulated by the purchase money and interest. Hence some courts have permitted the defendant in this action to go behind the deed and prove the actual consideration to have been less than that expressed in the deed. But the damages for the breach of a covenant against incumbrances depend upon the value of the incumbrance, without reference to the value of the land or the purchase money. The covenantee is entitled to recover what he has paid to extinguish the incumbrance, if he has paid a reasonable and fair price. The testimony in relation to the consideration, then, could not have been admitted with any view to the *amount* of damages.

The purpose really aimed at by the testimony in this case was probably to show a resulting trust in the grantor, and thereby defeat the action entirely. This is a privilege which strangers, whose interests are affected by the deed, are allowed, but between parties and privies, such testimony is inadmissible. Parties and privies are not permitted to allege their own fraud as a ground for varying or avoiding a deed. *Belden vs. Seymour*, 8 Conn. R. 312.

It will be readily observed, that the principle upon which this case turns cannot be affected by the accidental circumstance, that the grantee is one of the heirs of the grantor, and by means of the fraud gets advantage over his co-heirs, which neither the law of distribution, nor the grantor's will designed. The grantor and his son, the grantee, were both participators in the fraud, and its object was to enable the grantor to defraud the government of the United States. The party defrauded has not complained, and is not attempting to set aside the deed. There is no pretence that the deed is otherwise than it was intended to be, but merely that the grantee is unwilling to comply with a secret understanding which existed between the parties, and which is totally inconsistent with the face of the deed. In such a case, there is manifestly no hardship in holding the grantor to his deed, and if, as in this case, this hardship decends to his children or heirs, it results from a principle of law, too well settled and too necessary to be maintained in other cases, to authorize us to disturb it here.

The judgment must be reversed, and the cause remanded.

Judge Birch having been of counsel in the court below, did not sit in this case.

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POWERS vs. BROWDER Adm'r. of HEATH to use of O'BRYAN et al.

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**POWERS vs. BROWDER ADM'R. OF HEATH, TO USE OF O'BRYAN,  
ET AL.**

1. Informalities in the application for a change of venue are waived by a party appearing during the progress of the cause subsequent to its removal. The voluntary appearance of the party resisting the change, gives the court to which the cause is removed jurisdiction over his person.
2. The declaration averred that the defendant, on &c., at &c., by his writing obligatory, sealed with his seal &c., obligated himself to pay, on &c., to A. for value received, one thousand dollars, and then and there delivered the said bond, &c. The bond offered in evidence, in addition to the above, contained the words "without defalcation or discount," held that as the declaration did not profess to set out the bond in so many words, but only its substance, the variance between the bond described in the declaration and the one offered in evidence, is not material.

APPEAL FROM POLK CIRCUIT COURT.

**TODD & LEONARD, for appellant.**

1. The affidavit for a change of venue must be made by a party to the suit; so is the statute. Even a beneficiary named upon the record, is not a party within the meaning of this statute.
2. There was a variance between the declaration and the bond sued on. The declaration was as upon a bond payable generally, and the bond, given in evidence, was payable without discount or defalcation, and the legal effect of one is different from that of the other.
3. The deposition of R. B. Heath, ought to have been excluded. The examination is not certified to have been in the presence of the examining officer, nor is it affirmed by the clerk that the person acting in that capacity, was a justice.
4. The defendant's motion to dismiss the suit, made at the April term 1849, ought to have prevailed, and the court erred in overruling that motion.

**HAYDEN & WINSTON, for appellees.**

1. So far as the question is concerned as to the deposition of Heath, it is sufficient to say, that it does not appear from the bill of exceptions, or from the record, that the same ever was read in evidence, and even if the court committed error, it was one which could not have prejudiced the appellant.
2. The second objection taken by the appellant is, that the court permitted a bond to be read to the jury. The issues in this cause are upon the appellant's plea of non est factum and upon his rejoinders. The rejoinders put in issue the assignment of the bond, generally, and also whether the assignment was made previous to the commencement of the suit in chancery mentioned in the plea, *puris darrien contumance*. There is no pretence that the assignment was not sufficiently proved; and the only question that can come up on the record, is one of variance. The declaration does not pretend to set out a copy of the bond, but only describes its legal effect. We are at a loss to discover any variance, as we contend that the legal effect of the bond, set out in the bill of exceptions, is the same as that described in the declaration; but the bill of exceptions does not pretend to set out all the evidence in the cause, but only states that a certain bond, after proof of the assignment thereof, was offered to be read to the jury, that the appellant objected to the reading of the same, but his objection was overruled and the bond read; and sets out a copy of the bond without stating that the bond set out in the bill of exceptions is the same sued upon; so that, we contend, upon the record, that the question of variance is not presented to this court.

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POWERS vs. BROWDER, Adm'r. of HEATH, to use of O'BRYAN, et al.

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3. We contend that there was no necessity of making O'Brien's administrator a party to the suit, when there was already a legal plaintiff. The declaration describes Browder as the plaintiff, and there is nothing in it to show that he sues to the use of O'Brien or of any one else; but after the conclusion of the declaration there is a writing upon the paper containing it to the following effect: "This suit is brought to the use of Thomas O'Brien, and others."

ADAMS & WINSTON."

This is no part of the declaration, and even if it were, the court would not suffer the suit to be dismissed for the want of a party to prosecute the same, when the plaintiff who commenced the suit was alive and prosecuting the same. This objection appears little less than absurd.

4. As to the awarding the change of venue, it appears that at the November term of the Benton circuit court, 1846, the plaintiff presented his petition for a change of venue, and this was verified by one Thomas B. Smith, who describes himself in the affidavit as interested in the event of the suit, and one for whose use the suit was instituted. The change was awarded to Polk county, and no objections were made at that time by the appellant. We contend that the court below committed no error in awarding a change of venue, as the application was made by the plaintiff and an affidavit to the facts of the petition, by any one interested in the suit, was sufficient; but even if this were not so, after the defendant appeared to the suit in the court to which it was taken, and obtained some three or four continuances, and after the expiration of three years, it was too late for him to make the objection.

NAPTON, J., delivered the opinion of the court.

This was an action of debt commenced in the Benton circuit court, by the administrator of Heath against Powers and Ashly upon a bond for the payment of one thousand dollars. The case was removed to the circuit court of Polk county, and was there tried upon the issue of *non est factum*, and a verdict and judgment given for the plaintiff.

The change of venue had been ordered in 1846, and at the April term of the Polk circuit court, 1848, the defendant moved to suppress the deposition of Richard B. Heath, because it had not been certified or authenticated as the law required. This motion was overruled.

At the same term, the death of O'Bryan, to whose use the suit was brought, was suggested by the defendant, and the court directed security for costs to be given to indemnify the nominal plaintiff.

At the April term, 1849, the defendant, Powers, (the suit having been previously dismissed as to Ashley,) moved to dismiss the suit upon the following grounds. 1. Want of due diligence in its prosecution. 2. No renewal of the suit since the death of O'Bryan. 3. The failure to give bond by the *cestuys que use*. This motion was overruled and an exception taken.

At the October term of the same year a motion was made to strike the cause from the docket, because of some informality in the change of venue; the defendant insisting that the Polk circuit court, had no juris-

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POWERS vs. BROWDER, Adm'r. of HEATH, to use of O'BRYAN et al.

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diction. This motion was overruled. In support of the motion, it appeared the application for a change of venue was signed by the attorneys of the nominal plaintiff, and the affidavit was made by one Th. B. Smith who professed to be interested in the suit.

On the trial of the cause at that term, the plaintiff offered in evidence an obligation conforming in substance to the one declared on, except that the money was to be paid "without defalcation or discount." An objection was made on account of variance, but the objection was overruled. The declaration averred that the defendants, on &c., at &c., by their certain writing obligatory, sealed with their seals &c., obligated themselves to pay, on or before the 25th day of December, 1842, to one Richard B. Heath, for value received, the sum of one thousand dollars, and then and there delivered the said bond, &c.

The first error alleged is the affidavit for a change of venue. Without passing any opinion upon the formality of the affidavit, we consider the objection as coming too late. The venue had been changed, and the parties taken several steps in the cause, prior to the motion to dismiss the case for want of jurisdiction. That the circuit court of Polk county, had jurisdiction of the subject matter of this suit, is beyond dispute. The voluntary appearance of the defendants during the progress of the cause, subsequent to its removal to Polk county, gave the court of that county, jurisdiction over their persons, and any informalities in the application for a change of venue, were thereby waived.

We are not of opinion that there was any material variance between the bond offered in evidence, and that described in the declaration. The declaration did not profess to set out the bond in so many words, but merely described its substance. The bond produced, contained every thing which the declaration described it as containing. The words of the bond, omitted to be stated in the declaration, "without defalcation or discount," were inserted for the benefit of the plaintiffs. Their omission could not possibly prejudice the defendants.

The objection to the deposition of Heath is not an available one here, even if the facts were as suggested. It does not appear from the record that the deposition was read on the trial.

Judgment affirmed.

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## GATES vs. KERBY.

## GATES vs. KERBY.

If the maker of a note be notified of an assignment of it before he is summoned as a garnishee, the assignment constitutes a valid defence to the garnishment. If, however, this defence should prove unavailing under the garnishment, and judgment be rendered against him, it cannot affect the right of the assignee to recover the debt.

## APPEAL FROM MACON CIRCUIT COURT.

## WILSON for appellant.

The court erred in giving the plaintiff's instructions, and also in refusing the 1st and 3rd instructions moved by appellant; both these instructions are sustained by the evidence in the cause. *Wolf vs. Cozzens*, 4 Mo. Rep. 431.

## CLARK for appellee.

1. The written assignment of the note to him, conveyed to him the legal property in the same, and such assignment being made before Gates was garnisheed, he did not at the time he was so garnisheed owe the original payee any thing. 5 Mo. Rep. 433.

2. It appears by the record in this case, that Gates at the time he was summoned as garnishee, as well as when he answered under such summons, had notice of such assignment; consequently, any judgment he may have suffered, or payment made as the debtor of the original payee of the note, did not extinguish the right of the assignee, nor Gates' indebtedness to him by virtue of such assignment. 8 Mo. Rep. 367; 9 Mo. Rep. 442.

## NAPTON, J., delivered the opinion of the court.

David R. Kerby, the appellee, sued Gates by petition and summons in the circuit court of Macon county, at the May term 1848, upon a note for one hundred dollars, executed by said Gates to one A. Q. Kerby on the 15th February 1845 and payable the 25th Dec. 1847. On the back of this note there was the following assignment. "This the second day of Feb. 1845, I assigned the within note for value received to David R. Kerby. Asa Q. Kerby."

Upon the trial it appeared that this assignment was executed the day after the note was given—that the assignment was made in consideration of an understanding by said David R. Kerby, the assignor's brother, to remove him (Asa Q.) to Putnam county and there furnish him with corn &c. That one Thomas Gun then had a judgment against the assignor—that the assignor informed the defendant Gates of the assignment, but did not recollect when.

One Holstead testified that he was present when the note sued on was executed—that the subject of A Q. Kerby's indebtedness was men-

## GATES vs. KERBY.

tioned, and it was proposed to the assignor to give the note in the name of some other person to secure it from his creditors, but the assignor (A. Q. Kerby) replied, "that he had a place for the note, that he intended to assign it and get for it money to enter land in Putnam county, where he was about to go."<sup>2</sup>

The defendant read in evidence a copy of the proceedings in the case of Gunn vs Gates. From this record it appears that Gunn had recovered a judgment against A. Q. Kerby for about \$100, and that Gates was summoned as a garnishee—that interrogatories were propounded to said Gates, in answer to which he admitted indebtedness to Kerby, by a note, but stated that he had good reason to believe and did believe that said note had been assigned before the service of said garnishment. Judgment was given against Gates.

Instructions were asked in relation to the supposed fraud designed upon the creditors of A. Q. Kerby, which were given.

The instructions in relation to the assignment and the payment under the garnishee process, asked by the defendant, were refused. These instructions or opinions were substantially, that the judgment in the case of Gunn & Kerby, against Gates as garnishee was a bar to this action; and that it was the duty of the plaintiff, if he wished to protect his interest as assignee, to have interpleaded in that suit.

The court declared the law to be. 1. That if the garnishee was summoned after the assignment, and had notice of the assignment at that time, the plaintiff in this suit was entitled to recover. 2. That it was not the plaintiff's duty to interplead in the case of Gunn vs Kerby, unless he had notice of the garnishment. 3. If the note was assigned to the plaintiff before the defendant was garnisheed, the plaintiff was entitled to recover.

The plaintiff had a verdict and judgment.

It was held in this court in the case of Bates vs Martin, (3 Mo. Rep. 367,) that a payment of a note to the payer, after assignment, although no notice of the assignment was given, would not discharge the maker's liability to the assignee. This opinion was based upon the peculiar language of our statute, which provided that in actions by an assignee, the maker should be allowed every just set off and discount against the assignor *before assignment*. The most equitable doctrine is that which required the assignee to give notice, if he desired to be relieved from the effect of any transactions between the assignor and the maker of the note, subsequently to his becoming the holder of the security. St. Louis Per. Ins. Co. vs Cohen. 9 Mo. Rep. 442. The case of Wolf vs



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 SMITH, Adm'r. of TAYLOR vs. NEWBY.
 

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Cozzens (4 Mo. Rep. 431) is not reconcilable with the previous one of Bates vs Martin, unless it turned upon a question of fraud, which is obscurely hinted at in the opinion.

In the present case the maker of the note was notified of the assignment, before he was summoned as a garnishee, and that assignment constituted a valid defence to the garnishment. That this defence proved to be unavailing in the suit of Gunn vs Kerby cannot affect the rights of the assignee, who is now plaintiff. He had his remedy and may not have lost it yet; but if he has, it has not been the fault of the present plaintiff.

Judgment affirmed.

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SMITH, ADM'R. OF TAYLOR vs. NEWBY.

1. In the year 1841, A was residing in the State of Virginia, and owned a negro woman. In the month of March of that year, B stole the woman, and took her to a point near the line between Virginia and Kentucky. At this place, C, a creditor of B, and a citizen of this State, purchased the woman from B, and immediately brought her to this State. C afterwards sold the woman to D, who sold her to E, who sold her to defendant. A died in Virginia, in February, 1846, having never ascertained where his slave was. Plaintiff became the administrator of A, in this State, on the 2d of April, 1847, and instituted this suit on the 8th of the same month, for two children of the woman; having ascertained the above facts after the death of A. Held, that the statute of limitations commenced running against A from the time B returned to this State with the woman. That, although A did not know where his slave was, and was ignorant of the facts necessary to enable him to institute suit that ignorance was not occasioned by the improper conduct of the defendant, and did not deprive defendant of protection under the act. That A having died within five years after his cause of action accrued in order to prevent a bar by limitation, plaintiff should have commenced his suit within one year after his death. That it was not necessary for the defendant to make out five years possession by himself in order to get the benefit of the statute; but that it is the *failure by the plaintiff* to institute suit within the prescribed time that constitutes the bar.
2. It is the settled construction of acts of limitation, that when the act commences to run nothing stops it.
3. Absence from, or non-residence of a plaintiff in this State, does not prevent the running the statute of limitations.

SMITH, Adm'r. of TAYLOR vs. NEWBY.

## APPEAL FROM PLATTE CIRCUIT COURT.

## STATEMENT OF THE CASE.

This is an action of detinue brought by the appellant against the appellee, to remove two negro boys, upon the following state of the case, as shown by the evidence on the trial.

The deceased, William M. Taylor, in his life time, in York county, Virginia, owned a negro woman named Louisa. About the spring of 1841, this negro woman disappeared—supposed to have run away, and to have run away with a strange white man, who had been in the neighborhood, and who disappeared about the same time. In the month of March, 1841, one Burgess, a resident of Platte county, Missouri, and then on a visit to Kentucky, near the line which separates that State from Virginia, hearing that one Gowens, who was largely indebted to him, was just across the line, in Virginia, with a negro boy in his possession, determined to go and get the boy from Gowens, in the way of his demand, by the best means he could. He went across, found Gowens and the boy, and succeeded in inducing him to let him have the boy in the way of his indebtedness, at the extravagant price of \$800. This took place from the 15th to the 20th March, 1841, not later than the 20th. Burgess immediately returned to Kentucky, and thence forthwith to Missouri, taking with him the negro. On his way to Missouri he discovered the negro was a woman in man's clothing. After his return to Missouri, Burgess sold the negro woman to one Allen; Allen sold her to Tetherwoods, and he sold her to defendant. The two boys sued for are the children of Louisa, born after she came to Missouri. William M. Taylor died in Virginia about the last of February, 1846, and the plaintiff became his administrator in this State 2nd April, 1847. Suit was commenced 8th April, 1847. It was testified that it was not known where said negroes were until after the death of Taylor.

Upon this state of facts, the appellant asked the following instructions:

1. "If the jury believe from the evidence that the negro woman, Louisa, is the mother of the boys mentioned in the declaration, and that she was the property of William M. Taylor, of Virginia, deceased, at the time of his death, and William Smith, the plaintiff, is his administrator with the will annexed, they will find for the plaintiff."
2. "If they find for the plaintiff, they must find the value of each negro separately."
3. "That unless Alexander Gowens, at the time he let Burgess have the negro woman, described in the evidence in this case, had good title derived from William M. Taylor, deceased, in his life time, to said negro woman, then said Burgess, by his purchase from him, acquired no title by said purchase."
4. "If the jury believe from the evidence, that the negro woman Louisa, was stolen from William M. Taylor of Virginia, and knowledge of the fact that the negro was in Missouri did not come to Taylor, or his administrator, until five years before the bringing of the suit, they will find that the suit is brought in time to entitle the plaintiff to recover."
5. "That the five years possession by defendant, or those under whom defendant claims, which gives title under the statute of limitation, must be an adverse possession; and if the jury believe from the evidence, that the negro woman Louisa was, about the spring of 1841, stolen from William M. Taylor, dec'd, in his life time, and is the mother of the boys named in the declaration, then said statute of limitations cannot nor did not commence to run in this suit against said Taylor, or his administrator, until he had some knowledge or information of her being in possession of defendant or those under whom he claims."

The appellee asked the following instructions, to wit:

"That if the jury believe from the evidence, that the mother of the boys in the declaration, mentioned, before the birth of said boys, was purchased by one Burgess, in the month of March, 1841, and he sold to one Allen, and Allen, to one Tetherwoods, and he sold to defendant, and said woman and children, have been in possession of said persons, successively claiming

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them as their own for five years before said suit was brought, they will find for defendant, unless said Taylor died before the expiration of said five years; but if said Taylor died within said five years, then the action may have been brought after the expiration of said five years, provided it was brought within one year after the death of said Taylor."

The defendant's and the first and second of plaintiffs were given by the court; the third, fourth and fifth of plaintiffs were refused. To the giving of defendant's and refusing plaintiffs, plaintiff excepted. Whereupon plaintiff took a non suit, and filed his motion to set it aside, which was overruled. The grounds were two. 1. That the court erred in giving and refusing instructions. 2. The court erred in excluding from the jury evidence offered by plaintiff, of the reputation of the neighborhood as to the parentage of the boys sued for.

### ALMOND & SPRATT for appellant.

The first question presented by the record is, could defendant, under the evidence in this case, avail himself legitimately of the statute of limitations, as contained in the instruction given by the court at the instance of defendant, and which is based on the 6th section of article 2, of our statute of limitations. Rev. Code, 1845, p. 717. We contend that defendant could not; for although defendant's said instruction is based upon the abstract principles of law contained in said section. (No. 6) still the testimony recited and preserved in the bill of exceptions, shows that the hypothesis contained in said instruction, and contemplated by said section, cannot and does not apply to the case at bar, for the following reasons:

1. To have entitled defendant to have his said instruction, he ought to have shown a suitable case as presented by the evidence; and in determining whether defendant did show such suitable case, it is only necessary to look to the evidence as preserved, and also to look to all the sections of our said act of limitations applicable to said evidence, and by comparing the evidence in this case with said 6th section of 2nd article, and also with the 7th section of same article, and also with the 8th section of the 3rd article of said act, in connection with the 2nd sec. 2nd art. of said act, it will be seen that the two last named sections apply to the case as pointedly as the section first named, and should have prevented the court from giving defendant's said instruction. For whether the decision of our supreme court, in the case of King vs. Lane, 7 Mo. R. 241, or the decision in 3 Johnson R. 263, is still the law or not under our revised code of 1845, page 717, sec. 7, before referred to, (and it would seem that the reasoning in said decision is broad enough to embrace this case,) still it is clear from the evidence that the very improper act of Burgess, in purchasing and removing the woman to Missouri, under whose possession, in part, defendant claims title to said negro boys, would and did prevent the statute of limitations from running in his favor, and in fact in favor of any one claiming under him.

2. From the evident meaning of said 7th sec. of 2nd article of our act of limitations aforesaid, the instruction given for the defendant is evidently too broad; for at the time the cause of action herein accrued against the said Burgess, he being a resident of this State, was out of the State, and the limitation of five years, under our, which gives title, did not clearly commence running in his favor 'till his return to this State. The said instruction decides, that said statute commenced running from the time Burgess got possession of said negro woman, in favor of said Burgess and those claiming under him.

3. The cause of action herein, first accrued to Taylor, the deceased, in his life time, who was a resident of Virginia, in the State of Virginia, against Gowens, who was in Virginia, and who was not a resident of Missouri; and the principles laid down in said decisions of King vs. Lane, 7 Mo. R. 241, and in 3 Johnson 263, although said decisions were made under the act of 1825, here apply and would prevent the running of said statute of limitations against Taylor or his legal representatives until he or they should come to the State. Although

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the decision in *King vs. Lane* was made under the act of 1825, which by its letter extends only to non-resident plaintiffs, still the spirit of said decision, and the reasoning of the court, therein, extends the doctrine to defendants, whether resident or non-resident, and seem to be applied by the court to the act of 1835, which is similar to our act of 1845, with this difference; that the act of 1845, confines its operations towards defendants, to those only, who are residents of this State. We are frank to admit, however, that our minds are not clear in reconciling the decision and its reasoning in *King vs. Lane* with the respective acts of 1825, 1835 and 1845.

4. But the instruction of the court given for defendant is wrong in another point of view. That instruction assumes, that if the possession of Burgess, Allen Titherow & defendant put together, amounted to six years from its commencement to the beginning of this suit, then plaintiff could not recover. Now this position is incorrect; and unless Burgess or Titherow, or defendant had the five years possession required by our statute, to give title, then there is no pretence for pleading the statute of limitations. It is not contended that either Burgess or Allen or Titherow, or defendant separately, had that five years possession, and plaintiff contends that defendant had no right to consolidate their possession in his favor. *Perry's Adm'r. vs. Pullam, Haywood & Co.*, p. 16; *Elmore vs. Mills*, do. p. 359; *Bishop vs. Little & Greenleaf*; *Maine R.* 405.

5. But even admitting that the defendant had a right to consolidate the possession of said men with his own, in his favor, to make out said period of six years, then surely, if Burgess falls under the operation of the 8th section of the 3rd article of our act of limitations, (*R. C.* p. 720) defendant is affected by it. And the act of Gowen's from whom the title is derived, by Burgess, hiding out in Virginia with the woman Louisa, dressed in men's clothes, evidently to prevent her from being recognised and recaptured by the true owner, if said woman was stolen from Taylor, as assumed by plaintiff's 4th instruction; and Gowen's known bad character, being known to Burgess, and his act in forcing Gowen's to sell to him by threats, at so high a price, and running her under such suspicious circumstances, to Missouri, in such hot haste, are such improper acts by Burgess as are contemplated by said 8th section, and prevented the statute from running in favor of Burgess at least; because thereby he prevented the true owner from commencing his action in Virginia.

6. Said acts of Burgess, under the circumstances, also constitute such a "concealment" of the property as to prevent the running of the statute till Taylor or his legal representatives heard where the woman was. *Sec. 8 R. C. 1845*, p. 720; *Arnold vs. Scott* 2 Mo. Rep. 14.

7. But I hold that Burgess, or those claiming under him, upon the supposition that the negro woman Louisa was stolen from Taylor, never had such adverse possession of said woman as gives title under our statute until Taylor, or his legal representatives had a knowledge of that possession. *Smoot vs. Walther's adm'rs.* 8 Mo. R. 522.

8. Nor did the statute commence running in favor of defendant till there was some one in being capable of suing for said woman and her children, and there was no one in Missouri capable of suing till plaintiff herein administered, and upon the assumption heretofore made that the cause of action did not accrue to Taylor in his lifetime, against defendant, the statute of limitations never commenced running in favor of defendant till plaintiff administered as aforesaid, or till defendant became possessed of Louisa. *McDonald adm'r. of Pogue vs. Walton*, 1 Mo. R. 521.

#### DONIPHAN & BALDWIN, for appellee.

1. It no where appears upon the record, that there was evidence of the reputation of the neighborhood as to the parentage of the boys sued for, offered by appellant and excluded by the court.

2. The court did not err in refusing the third, fourth and fifth instructions asked by appellant. The third instruction was inapplicable to the case before the jury; it could have done

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the plaintiff no good if it had been given, and the refusing to give it did him no injury; but it is positively defective and objectionable, in this; that it assumes the property of William M. Taylor in the negro woman, at the time Burgess purchased her of Gowens, and refers a question of law to the jury, as to the title of Gowens. The fourth and fifth instructions are liable, both of them, to the same objections. Most unquestionably the statute might operate a bar to an action, notwithstanding it may have had its origin in larceny, and the owner's ignorance of where the stolen property was. I take it, that the instruction should have comprehended substantially, what before the recent alteration in pleading, would have been required in a replication. The instructions should have brought the appellant within the saving of the 8th sec. of the 3d article of the statute of limitations, (as that was what was probably intended) and referred the question to the jury as to the prevention of the action. Ignorance as to who had possession of the negroes, could not prevent the running of the statute. Vide *Scott vs. Arnold*, 3 Mo. R. 14; *Barnard & wife vs. Boulware*, 5 Mo. R. 454; *Sneed vs. Hall*, 2 A. K. Marshall 22; *Thomas vs. White, &c.*, 3 Little 183, 4; *Troup vs. Smith's ex'rs*, 20 J. R. 33; The introduction of this 8th sec. of the 3rd article of our act was intended as a legislative settlement of the question as to fraud taking a case out of the act,

3. The court did not err in giving the instructions asked by the appellee. That instruction is substantially the law of his side of the case, and it was for the plaintiff, if he conceived himself entitled to any of the savings of the act, to have asked instructions accordingly. Vide *Smith vs. Rowree*, 3 A. K. Marshall 529, 30. The appellee had a right to avail himself of the running of the statute, from the time when the cause of action first accrued against those under whom he derives his claim, and is not confined to the time when he acquired the slaves, or became liable to the action. Vide *Crozier vs. Bryant, adm'r. &c.*, 4 Bibb 177, 8; 3 Chit. Pl., 941; see form of plea of the statute; *Hord vs. Walton* 2 A. K. Marshall 620.

4. It appears to be a notion of some, based upon the case of *King vs. Lane*, 7 Mo. Rep. 211, that the statute does not run against absent plaintiffs. The saving in favor of absent plaintiffs, was repealed with the act of 1825, and has not been introduced into the law since. In the 7th sec. of the 2nd art. of our acts of 1835 and 1845, defendants, only, are mentioned. This section is taken from 4 & 5 Orm. The courts of England would have been just as able to create a saving as to absent defendants, by construction, out of the saving in favor of absent plaintiffs, contained in the act of 21 James 1, as our court to create a saving in favor of absent plaintiffs, by construction, out of the 7th sec. of the 2nd art. of our act; but they repeatedly acknowledge their inability to do so. Vide 2 Tomlin. law Dictionary, 467.

**NAPTON, J.**, delivered the opinion of the court.

The question principally discussed in this case, turns upon the construction of the 8th sec. of the 3rd article of our statute of Limitations. That section provides, "that if any person, by absconding or concealing himself, or by any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented." It is contended by the plaintiff, that the statute did not commence running against him or his testator, until he had obtained such information in relation to his stolen or run-away slave, as would have enabled him to commence an action. The case of *Arnold vs. Scott* (2 Mo. R. 14) is cited in support of this pro-



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position. The head note of that case is calculated to mislead. The only question in the case was upon a sufficiency of a replication, which averred "that said A. during the space of five years next after the conversion, concealed the said taking and conversion, so that the said S. did not within that time come to the knowledge thereof." This replication was held good. The act of 1825, expressly excepted from its benefit, a defendant who absconded or concealed himself, or removed out of the State, Territory or district, where the cause of action accrued, or who by any other indirect means, defeated or obstructed the bringing of a suit. The concealment of the property converted was clearly such an obstruction. The ignorance of the plaintiff, in relation to his lost property did not constitute the gist of the replication, but the actual concealment of the defendant, which of course was the occasion of that ignorance and thereby prevented a suit.

The questions considered in the case of *Troup vs. Smith* (20 Johs. R. 32,) and *Mass. Turn. Co. vs. Field and others*, (3 Mass. R. 201,) and other similar cases, are not important here. Our statute has settled those questions.

Our statute does not protect plaintiffs who are ignorant of the facts necessary to enable them to bring suit, unless that ignorance is occasioned by some improper conduct on the part of defendants. If the defendant absconds or conceals himself, or does any other improper act to prevent the commencement of an action, he is not within the protection of the statute. If he has not done these things, or any of them, he is protected, although, as in the present case, the plaintiff may have been guilty of no laches. Between two parties equally innocent, one of whom must sustain a loss, it is not the policy of the law to interpose.

There is a section of our statute, which makes certain provisions saving the rights of plaintiffs; but no provision is made for a case like the present. We have no power to interpolate such a saving, even if it were thought equitable and just.

These principles will readily lead to the conclusion that Gowens, the person who stole the slave from Taylor, or who aided her in escaping, was not within the protection of the statute. Nor was Burgess, who purchased of him, if he was a *particeps criminis*. There were circumstances attending this purchase which certainly might have created suspicion; but it is to be inferred from the course taken at the trial, that this point was not designed to be made before the jury. No instruction was asked, calculated to bring in question, Burgess' conduct. His character was perhaps entirely beyond the reach of suspicion. The instruc-



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tion given by the court seems to assume that the purchases of Burgess, Allen, Tetherow, and the defendant were all *bona fide*, and no counter instruction was asked, having any bearing upon the matter in dispute, so far as the honesty and fairness of these four were concerned. The non suit taken, did not result from the refusal of the court to give any instruction on this point, for none was asked.

The statute of Limitations then commenced running in favor of Burgess (if his purchase was *bona fide*) from the time of his return to this State. The instruction given by the court was, that the statute commenced running from the time Burgess obtained possession of the woman. This was erroneous; for Burgess was a resident of this State, within the 7th section of the 3rd article of the statute, and being temporarily absent at the time of getting the negro woman Louisa into his possession, the plaintiff was not bound to sue him until his return to this State, and the statute did not commence running in his favor until that time. The error is not however important, as the last branch of the instruction, which is drawn from the 6th section of the same article of the act is clearly fatal to the plaintiff's recovery. It makes no difference, whether we calculate the running of the statute from the 20th of March, which is testified to be about the time of the purchase, or a few weeks later when Burgess returned to Missouri since upon either hypothesis, Taylor died within the five years, and the suit was not instituted within a year from the death of Taylor. It would only be putting the parties to unnecessary expense to reverse the judgment for an error of this kind.

It is argued, that the defendant in this case must make out a five years possession of his own, in order to get the benefit of the statute, and that he cannot tack on to his possession the previous possession of Allen, Titherow and Burgess. This is a misapprehension of the statute. The statute says nothing about adverse possession. It is the failure to bring the suit by the plaintiff within the prescribed time which bars, and this bar is effectual, unless the plaintiff brings himself within some of the savings made in his favor or deprives the defendant of the protection of the statute by showing him to be within some of the provisions designed to effect this object. Besides it is the settled construction of these acts of limitation, that when the act commences running nothing stops it.

Another point in the case is, that the absence of the plaintiff from this State prevents the running of the statute. The case of *King vs Lane* (7th Mo. Rep. 241) is cited; but is totally inapplicable to the

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act of 1845. There is no saving in favor of plaintiffs in this statute, by reason of their non residence, except in the cases enumerated in the 1st section of the 3rd article, and the present is not one of them. Non-age, insanity, imprisonment and coverture are the only disabilities enumerated in the fifth section of the 2nd article, where all the legislation upon this branch of the subject is to be found, excepting the provisions in the 1st section of the 3rd article in favor of citizens of a foreign country, at war with the United States. The absence from, or non residence of the plaintiff in this State, did not prevent the running of the statute.

Judgment affirmed.

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1. Upon the trial of a suit brought by an execution creditor against an officer upon his bond, for a failure or refusal to execute a writ, the return made by the officer upon the writ, is evidence in his favor to show an excuse for not executing it.
2. Where two justices of the county court grant a writ of injunction to stay proceedings upon an execution in the hands of a constable, although it may be the duty of the clerk of the circuit court to issue the writ, and not the justices, yet if they do issue the writ, it (though informal) is sufficient authority to the constable to stop all further proceedings upon the execution.
3. An officer has until the return day of a writ, to execute it; and if within a few days previous to the return day he be restrained from further proceedings upon it, by injunctions, he is not liable for failing to execute it sooner, unless the plaintiff shows special circumstances which would make it his duty to execute it sooner, and his refusal and that in consequence thereof, the plaintiff has suffered loss.

ERROR TO CAMDEN CIRCUIT COURT.

KOWNSLAR, for plaintiff in error.

The paper read in evidence is not a writ of injunction, nor any evidence of one. Two justices of the county court may grant an injunction, but the papers have to be returned to the clerk of the circuit court, who issues the writ Rev. Stat. 1835, Injunctions, sec. 2, 4, 11, 12 p. 315. It devolves upon the officer justifying under a writ, to show a legal writ. The bill must accompany the writ, and can only be served by a legal officer. See Practice in Chancery, article 1st, sec. 3, 4, 6; Rev Stat. 1835 507; see also writs and process, sec. 1st. 625. As to the manner of obtaining injunctions, &c. see 2d. Tuck Com. Injunctions 439.

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The service of the supposed writ being by a private person, was no service at all, and the officer was not bound to regard it, even if the writ were valid.

The return of the officer, that he was restrained by injunction, was improper evidence to prove that fact. See *State, use of McMahan & Huston vs. Hamilton et al.*, 9th Mo. Rep. 794.

The officer was bound to execute the writ of execution promptly, and without any unnecessary delay. See *Bac. Abi. title Sheriff; N. Bernant et al. vs. Ward*, 9 Mass. Rep. 237; *Douglass vs. Baker*, 9 Mo. Rep. 41.

If he refused to sell, he was liable for the whole amount of the execution. *Rev. Stat. 1835, sec. 52.*

The evidence in this case shows great neglect. He had advertised to sell three times and refused. The supposed injunction was not served on him until two days before the return day of the execution. The plaintiff's instruction ought to have been given, and the defendants refused.

That Kirkland was injured by the action of the officer is not manifest; for he alleges in his declaration that his judgment was in full force, unpaid and unsatisfied; and these allegations are nowhere traversed, and are therefore admitted.

Ferguson, the constable, was not a proper party defendant to a bill of injunction; he ought not to have been named in the writ. The plaintiffs in the execution were the proper parties, and the writ should have included and been served on them, and then it was for them to stop the constable at the peril of committing a contempt. This writ of injunction, then, was a nullity.

The question here is not what notice of an injunction an officer must have to justify him in stopping the execution of process; but whether there was in fact a lawful writ of injunction. The officer alleges that there was. Does he show one? It is conceived that he does not. He should have produced a properly certified copy of the bill with the restraining order endorsed thereon, and a writ emanating from the circuit clerk's office, or a copy of the writ. Here the only evidence of the writ is a paper under the hand of two justices of the county court, with the seal of the county court annexed.

### STRINGFELLOW, for defendant in error.

1. The return made by an officer is evidence in his favor to show an excuse for not proceeding under the execution. 11 Mo. Rep. 553.

2. It is not necessary that there should be a formal service of the writ of injunction, to justify an officer in obeying or subject him to punishment, for a contempt in disobeying its requisitions. It is only necessary that he should know that the order has been made, and is immaterial how he has been informed. *Eden on Injunctions*, 93; 12 Johns. Rep. 521.

### RYLAND, Judge, delivered the opinion of the court:

This was a suit upon a constable's bond, in the circuit court of Camden county, brought in the name of the State of Missouri to the use of the plaintiff Joseph Kirkland against John D. Ferguson, John Fullbright and Martin Fullbright. The said Ferguson was constable of Harmony Township in said county of Camden and the said John and Martin Fullbright his securities on his official bond as such constable.

The plaintiff alleges that Joseph Kirkland obtained a judgment before a justice of the peace in said county of Camden for some fifty dol-

lars debt and costs of suit, making about fifty nine dollars in all.—That the said Kirkland obtained an execution from the justice of the peace against the body, goods and chattels of one Jacob M. McNeal, the defendant in the suit before the justice of the peace, against whom he had obtained the judgment above mentioned : that the said writ of execution was dated 27th day of October 1840 and was returnable in thirty days—that the said writ was duly placed in the hands of said constable Ferguson, and that said constable levied the same upon sufficient property, goods and chattels of said McNeal in his township to have made the debt and costs ; but that said Ferguson refused to sell the property thus levied on. The plaintiff, also alleges as a further breach of said bond, that the defendant in the execution had not sufficient goods and chattels whereof the debt could have been made and collected, yet the said Ferguson, as constable, failed and refused to take into custody the body of said McNeal, the defendant in the execution ; and also, alleges that the said constable Ferguson failed and refused to levy of the goods and chattels of said McNeal in order satisfy the said execution.

The defendants filed their plea of non est factum and gave notice to the plaintiff, that they would insist also the trial upon special matters of defence, among which, was this, that an injunction had been granted by two justices of the county court of the county in which said Ferguson was acting as constable, and which injunction had been served upon him, restraining him from proceeding to execute the writ against the said McNeal any further.

Upon the trial, the plaintiff read in evidence the bond of said Ferguson as constable, with his securities as above named—a copy of the judgment of the said Joseph Kirkland against said McNeal—the writ of execution which had been returned to the justice on the 25th of November 1840, being within the time prescribed—also proved by witnesses that the defendant, Ferguson, levied the execution on the property of the said McNeal, took it with him to his own house, and advertised the same for sale—That the first day on which the sale of the property was advertised to take place, happened to be Sunday and that the defendant Ferguson refused to sell on that day, and again advertised the property for sale—That on the second day fixed for the sale, a part of the property taken in execution was claimed by a third person ; and that the constable refused to sell the balance, unless the plaintiff in the execution would give to him a bond indemnifying him for selling—That Ferguson, the constable, then set a day for the trial of the right of property and advertised again to sell the property levied on ; and that, on

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the last day fixed for the sale, one John Tullis, who had claimed the property as his, came forward, previous to the trial of the right of property, and served the writ of injunction on Ferguson, restraining further proceedings. The plaintiff also proved, that Kirkland commanded Ferguson to sell the property on the second day, which was not claimed by Tullis. This property consisted of a jack and some mill irons.

The defendant offered to read the writ of injunction, which was signed by Cyrus Colly and M. F. Smith as justices of the county court, and which writ was under the seal of the county court. The writ was directed to the constable of Harmony township in said county; stating that Jacob M. McNeal had filed his bond in the county court and prays for an injunction, directed to said constable to stay the proceedings in the execution of Joseph Kirkland vs said McNeal. This writ notified him, said constable, to stop all further proceedings on said execution and to release said property, that said writ may be remanded to the circuit court of said county for further proceedings. This writ was served on the said constable, Ferguson, by said Tullis.

The defendant also offered to read his return on the execution in favor of Kirkland against said McNeal. To both and to each of these papers, the plaintiff objected. The court overruled the plaintiff's objections and permitted the defendant to read the writ of injunction and to read the return made by him on the execution. The plaintiff excepted to this opinion and action of the circuit court.

The plaintiff asked the following instruction.

"If the jury believe from the evidence, that Ferguson was constable as is alleged in the declaration, and that judgment was obtained by Kirkland against McNeal and execution issued thereon, as is alleged in the declaration; and was placed in the hands of Ferguson as is alleged, and that he levied on certain property of McNeal, by virtue thereof, and refused to sell the same, before he had notice of the writ of injunction, then they must find for the plaintiff."

This the court refused to give. The defendant then asked the following instruction. "That if the jury believe from the evidence, that after the issuing of the execution in favor of Kirkland against McNeal, and before the return day of said execution, that two of the justices of the county court issued a writ of injunction, commanding said Ferguson to stay all further proceedings on said execution, then said Ferguson is not liable to the plaintiff for said debt in the execution mentioned and they will find the issue in this suit for the defendant."

The plaintiff thereupon took a non suit and moved afterwards to set



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it aside, which motion being overruled he brings the case here by writ of error.

The questions arising on this statement of facts, involve the propriety of the admission of the evidence on the part of the defendants in the court below. That evidence consisted of the writ of injunction and the constable's return on the execution in obedience thereto. This evidence being the foundation of the instruction asked for by the defendants, if it be legal, then the instruction was proper; and if this instruction was proper to be given to the jury, the one asked for by the plaintiff was properly refused. I will notice the return of the constable first. This return was admitted properly. It was not offered *as the evidence of the writ of injunction*, but was offered to show what had been done by the constable—to show how he acted with the writ. He was bound to make return of the writ of execution, and he does so, by stating that he returned this writ unexecuted because he had been restrained by writ of injunction. This return would not have been sufficient evidence of the injunction; nor was it offered as such—see the cases reported in 9 vol. Mo. Rep. page 794, and 11 vol. Mo. Rep. page 553, as to this point about the officer's return. According to the views of this court in the last mentioned case, this return was evidence between these parties. I can see no fault in the court below in admitting this return to be read to the jury.

The other question involves the action of the court in admitting the writ of injunction. By the law as it existed when this writ of injunction was granted; "The county court, or any two justices thereof in vacation, may grant injunctions in the following cases—First, to stay judgments or proceedings thereon before any justice of the peace within the county." "Injunctions shall be returnable to the circuit court of the proper county." Digest 1835, page 313. This writ was granted in this case by two justices of the county court. They made out the writ, signed it and had the seal of county court put to it. This writ was directed to the constable of the township; (to the defendant Ferguson for he was the constable) and was served on him by Tullis, who was a private person.

It is contended, that the justices of the county court can only make the order for the writ, and that the clerk of the circuit court must issue the writ. We will not undertake to say, that such is not the case. But nevertheless, we think that in this case, the writ of injunction, though it may be considered informal, was authority sufficient to the constable



## HALSTED vs. BRICE.

to stop all further proceedings on the execution; and that the circuit court committed no error in giving the instruction.

The justices of the county court had jurisdiction of the subject matter. They could grant injunctions, and the constable might well suppose that it was as much their duty to issue the writ as to make the order for the clerk to issue it. I am not inclined to apply the strictest rules of technical proceeding to such inferior officers and tribunals.

The duty of the constable was to execute the writ during the time it had to run, within the thirty days, and it may be his duty under some special circumstances to execute it sooner, and his failing to do so may make him liable, if, in consequence thereof the plaintiff should suffer loss or injury. We do not hold him bound to levy and sell within the first ten or twelve days; he had the thirty days as the time given him to return the writ in, under the law at the date of the writ in this case (now a much longer time.) The plaintiff cannot blame the officer, if within thirty days the defendant has stopped all further proceedings by injunction. This, the defendant in the execution could do, only on certain conditions; filing his bond was one. If, therefore, the injunction was granted wrongfully, the plaintiff in the execution can resort to his bond for redress. But let him support this present suit, under the facts in this case, against Ferguson; and he may recover against him, although in the injunction case, the court may decide that he has no just and equitable demand against McNeal. I am therefore upon the whole for affirming the judgment below and my brother judges concurring it is affirmed.

## HALSTED vs. BRICE.

1. A search warrant is not admissible in evidence for *any purpose*, unless it appears to have been founded upon the proper oath.
2. If any person other than a public officer be deputed to execute such a search warrant, the deputation is totally void; and if such person in executing the warrant commits a trespass, or do any tortuous act upon the property of another, the warrant will neither justify, excuse, or mitigate the act.
3. In order to authenticate, for the purpose of evidence, copies of proceedings had by a former justice of the peace whose term of office has expired, there must be some proof to

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show that the justice who certifies the copy, is successor to the one before whom the proceedings were had, and became possessed of his "docket and papers."

## APPEAL FROM DALLAS CIRCUIT COURT.

## TODD for appellant.

1. The evidence is conclusive and uncontradicted, that the plaintiff owned and possessed the tools sued for, and the verdict is clearly against evidence.

2. The testimony admitted by the warrant is in the light of a justification of the trespass; it is clearly inadmissible. It is entirely void by constitutional provision, being without oath; and a party cannot justify a wrong by evidence made by himself, and make by it a title by his own oath, if it had been sworn to. Rev. Stat. const. p. 24, sec. 13.

## BALLOU for appellee.

The counsel for the appellee insists that the warrant now in evidence was correctly admitted, whether the warrant was legal or not, or whether it was correctly certified or not.

1. Because the plaintiff first gave testimony of it. Lomax, plaintiff's witness, speaks of it, and says he was summoned by Mizer to assist in its execution, and it should have been admitted as a part of the transaction, as to the breaking of the box and taking the tools; or in other words, as a part of the *res gestae*.

2. It was admissible to go to the jury in mitigation of damages, which may be given by the jury over and above the value of the tools, if the plaintiff had recovered for their value, and is at least competent for that purpose; and whether it was sufficient or not for that purpose, is a question with the jury. It would have a tendency to show that Brice was acting in good faith, and as he no doubt thought, according to law, and is evidence to rebut the inference or conclusion that the jury might draw or come to, that Brice went there in a lawless manner, and without any color of right or authority, and broke open the chest or box, and took off the tools; for if the tools in fact belong to Brice, he had a right to take them wherever he could find them, if he did it without committing a breach of the peace, which is not contended here that he did. The plaintiff had given in evidence, as I contend, another separate and important cause of action, for the purpose of increasing the damages, if he should recover, for the tools, as to breaking open the chest, and the manner of taking the tools, which the defendant at the time objected to. The plaintiff has not been enjoined by the admission of the warrant in evidence, and could not be in any way, unless he had recovered the value of the tools, for he had no right to recover damages over and above the value of the tools for the other wrongs in an action of trespass, and as he failed to recover for the value of the tools, he was not entitled to recover damages for the other wrongs, or as it is termed, *smart money*, and it is self-evident he was not injured. Hall vs. Woodson, 2 McLean Rep. C. C. R. 332; 21 Pick. 384; 2 Cow. Rep. 56; Moore vs. Hawks, 2 Aik. Rep. 390; 13 Johns. 294; 3 Cow. 84; Story on Con., secs. 500 and 504.

3. If the warrant was competent evidence for any purpose, although it does not appear in the bill of exceptions for what purpose it was offered, this court will not reverse the judgment, although it might not be good evidence in justification of the trespass.

4. The court ought not to have rejected the warrant when offered in evidence, nor excluded it after it was read, nor granted a new trial, as the plaintiff did not state to the court wherein the warrant was defective or illegal, or wherein the certificate of the justice was insufficient or illegal; nor any reason why it should have been rejected or excluded. If any legal objec-

## HALSTED vs. BRICE.

tion had been pointed out, it might have been removed or remedied by other evidence by defendant, and the court is not bound to notice or regard any captious objection of this character, and to be compelled to search out a legal objection to evidence. It should have been specifically pointed out by plaintiff's counsel, so that the court could have expressly decided the point. 8 Mo. Rep. 131; 6 Mo. Rep. 186; 7 Mo. Rep. 316; 5 Mo. Rep. 549; 19 Wend. 562; 4 Wend. 277; Rev. Stat. 1845, p. 906, sec. 32.

5. Admitting that it was not legally certified, the testimony of Lomax, plaintiff's witness, identified it as the warrant Mizer had. He states that he took it to be the same when he was summoned to assist in its execution, which was sufficient proof to let it go to the jury.

6. The warrant was legally certified and substantially good. See Missouri Statutes, 1845, p. 470, secs. 21 and 24; also page 891, secs. 1 and 2; 8 Mo. Rep. 512.

7. The verdict of the jury upon the merits will not be disturbed, if there is some slight evidence to sustain it. The jury are the judges of the sufficiency of the evidence and the credit of the witnesses.

8. The plaintiff in error made no objection to the instructions in the court below, and is precluded from making any here.

9. The judgment of the court below ought not to be reversed.

Judge BIRCH delivered the opinion of the court.

This was an action of trespass, for taking and detaining certain tools of the plaintiff, upon which the defendant took the statutory issue. After testimony upon both sides, as to the ownership of the property, the plaintiff introduced a witness who testified that he saw the box of the plaintiff, broken open by one Mizer, under the defendant's direction, and under the authority of an alleged warrant for that purpose. The defendant objected to the evidence thus given, "as to the manner of taking the tools," but it was overruled. The same witness having further stated that he was summoned by Mizer, to assist in the execution of the alleged warrant, and having testified his belief of its conformity with a copy which purported to be set out in a transcript then before the court, it was permitted to be read to the jury, as follows:

"STATE OF MISSOURI, CAMDEN COUNTY:

"To the constable of Lick township, greeting: We command you to search and seize a certain lot of tools, consisting of five chisels, two augers, and one mortising axe, belonging to James Brice, supposed to be in the possession of John B. Halsted, or any where in the township, and give them up to said James Brice. Given under my hand, this 29th day of December, 1848.

JOHN ATCHLY, J. P."

"At the risk and request of the plaintiff, I authorize Hartwell Mizer, to execute, and return this writ.

JOHN ATCHLY, J. P.

"Justice's fee 15 cents."

"I return the within writ executed—tools found.

HARTWELL MIZER."

"I, J. J. Thraikill, do certify that the above is a true copy of the original writ, as appears on file in my office, this 6th day of October, A. D. 1849.  
J. J. THRAILKILL, J. P."

There being no testimony of any character, denoting that there had been any previous *investigation* as to the ownership of the property described in the warrant, we can only conclude that there was none. The plaintiff consequently objected to the reading of the paper as above set forth, and that objection being overruled and excepted to, he next moved to exclude it from the consideration of the jury, which was in like manner overruled and excepted to. The court thereupon (predicated, in part, upon other testimony, which it is not deemed necessary to copy here) instructed the jury without objections, as follows:

"If the jury believe from the evidence, that the tools had not been actually sold by Brice to Halsted, but that at the time Brice took them they still belonged to him, they ought to find for the defendant, although he may have caused the chest or box of plaintiff to be broken open to get them. And unless the jury believe from the evidence, that Brice sold the tools to Halsted, and delivered, or permitted Halsted to take possession of them in consequence of such sale, they ought to find for the defendant; and if the jury believe that the tools still belonged to Brice, it is immaterial, in this suit, how he got possession of them."

The jury having been allowed, without objection at the time, to receive and find a verdict upon the instructions of the court, thus given, neither the propriety of such instructions, nor of a verdict found in accordance with them, could, for any error subsequently suggested or alleged, be here reviewed. It is not questioned, however, but that to maintain the action of trespass, under such a declaration as the present one, the plaintiff must have been the *owner* of the property taken from him. The instructions being therefore well enough, and the whole question therefore, narrowed to the admission and subsequent non-exclusion of the so called warrant of the justice, it may suffice to say, that whilst it would seem that it could not possibly *enlighten*, it is not for us to determine how far its assumption, and recital of the *ownership* of the property, as being in *Brice*, may have confessed, mislead or influenced the jury upon that question—the *only* legitimate one in issue. But for that, it might possibly be passed by as one of the comparatively harmless irregularities into which courts sometimes degenerate. Beyond that it seems redundantly if not oppressively apparent, that a paper thus issued, served, returned and certified, was utterly and wholly inadmissible of or any purpose, whether in justification, excuse or mitigation.

Admitting that it may have been founded upon the proper "oath" of the party, as prescribed by the statute, it was nevertheless not only informal, insufficient and absolutely illegal upon its very *face*, but its execution was delegated to, and assumed by, a person to whom authority was not only not *given*, but to whom it was expressly interdicted. The first four sections of the ninth article of the "act to regulate proceedings in criminal cases," being the only ones upon which we can suppose the proceeding to have been predicated, however, much may at times be deferred to the inartificial irregularities of subordinate magistrates, it ought not to have been overlooked that in this case there seemed to have been an apparently *contemptuous* disregard of the law throughout. Even in the manner of certifying the alleged warrant, there is nothing from which it can be even legitimately *inferred* that the justice who makes the certificate became possessed of "the docket and papers" of the former justice in such manner as to impart the least validity to his certificate—so that if even the *original* pretence of a warrant might have been read, for the purpose ingeniously yet mistakenly argued by the counsel for the appellee, the unauthenticated paper, alleged to contain a copy of it could not be. I am unable, however, to perceive any thing out of the way in the testimony which was incidentally brought out by the plaintiff, "as to the manner of taking the tools"—certainly nothing to lay a foundation broad enough for the admission of *such* a transcript, either in its justification, excuse or palliation. If indeed, the defence stood upon *that* instead of the sole question of ownership, which the warrant was at least calculated to confuse, instead of elucidate, such a *transcript*, covering such a *warrant* and such a *service* of it, ought rather to augment than mitigate the damages. The admission of that transcript being therefore an error which cannot be pronounced wholly harmless, although it is *possible* that it may not, in any material sense, have influenced the finding of the jury, this court may regret, without feeling itself authorized to forego the obvious duty of reversing the judgment and remanding the cause, which is done accordingly.

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WASSON et al. vs. ENGLISH et al.

## WASSON ET AL. VS. ENGLISH ET AL.

1. If a trustee purchases trust property by him sold at public auction, in accordance with the trust, and immediately sells it to another, for an advance price, pursuant to an arrangement previously made with such other person that he should not bid at the sale, and in consequence of which the trustee purchased the property for less than its value, a court of equity will compel the trustee to account to the *cestui que trust* for the advance upon his purchase.

## APPEAL FROM PETTIS CIRCUIT COURT.

STUART &amp; MILLER, for appellants.

1. There was no *express* trust created in Ramsey & Wasson, by their purchase at the sheriff's sale, in April 1847, and the agreement entered into immediately preceding that sale.
2. The court could not properly *imply* a trust in them, from any misconduct on their part in purchasing the property, at the sale on the 1st Monday in August 1847, or prior to that sale.
3. Even if they were trustees by express agreement, or by implication, the decree of the court is erroneous. If they were trustees by express contract, we say that they did not speculate upon the trust fund, whilst they were acting in the capacity of trustees. If trustees by implication, then the decree should have been rendered setting aside the sale.

ENGLISH, for appellees.

1. The defendants are responsible as trustees; and herein of the statute of frauds, as applicable to the case.

1st, Because they admit the agreement in full in their answer, and do not set up the statute of frauds as a defence. To have availed themselves of the statute of frauds, they should have insisted upon it as a defence. 2nd Story's Eq. secs. 755 to 757; Wildbarger vs. Robideaux, 11 Mo. Rep. 659; 1 Cruise Dig. 421; 1 Green. Ev. sec. 266; Hampton vs. Spencer 2 Verm. 287 & 288.

2nd, Even if the defendants had insisted upon the statute of frauds as a defence, they would be held responsible as trustees; because the defendants having been permitted to take the place they held in the agreement, upon their own suggestion and for their own accommodation in lieu of the attorney for the judgment creditor, and of the complainants Montelius & Fuller, and upon their promise to perform the agreement made between English & Heard, and having bid off the land at the sheriff's sale, without being required to pay for it, and having thus got the title in their own name, immediately refused to execute a written declaration of the agreement, and proceeded to speculate upon the property for their own pecuniary benefit, will be regarded as trustees in equity on the ground of fraud. Roberts on Frauds, 102, 127, (no. 63;) Newel on Cont. 179; Story's Eq. secs. 330, 1265, 252, 256; 1 Cruise Dig. 429; Rose vs. Bates, 12 Mo. Rep. 30; Thyren vs. Thyren Verm. 296; Reech vs. Kennigate, 1 Ambl. 67; Brown vs. Lynch, 1 Paiges Ch. R. 147.

3d, Because the defendants, having admitted the agreement in full in their answer, and alleged in substance, that they have carried the agreement into effect, in good faith, and having admitted that they were trustees in fact, by executing their note for the benefit of Montelius and Fuller, for the balance of the \$810, left after satisfying the execution of Westerfield against English; equity will see that they have executed the agreement in good faith as trustees. Smith et al. vs. Isaac, 12, Mo. Rep. 109.



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2. Being responsible as trustees, they are not permitted to make any profit to themselves out of the trust property, but must account for all they received for the land. Story's Eq. secs. 321 to 323, 1211; 1 Madd. Chy. 91; New. on Con. 467; 2 Serg. on Vend. 124; 1 Cruise Dig. 499; 4th Kent's Com. 438 (5th edition;) *Whicheate vs. Lawrence*, 3 Ves. jr. 740; *Mealor vs. Keemle*, 2 Murphey's N. C. 272.

Judge BIRCH delivered the opinion of the court.

Westerfield having an execution against English, certain real estate belonging to the latter, was about to be offered for sale, at the April term of the Pettis circuit court, 1847. Heard, who was the attorney for Westerfield, having also in his hands for collection certain other demands against English, in favor of Montelius and Fuller, (also plaintiffs here,) entered into an arrangement with English, whereby he, (Heard,) was to purchase in the property at the sheriff's sale, for a sum simply covering the amount due upon Westerfield's execution, and that English or his friends might either redeem it, or that it should be publicly resold on the first Monday in August following, upon such terms as would best promote the interest of all the parties concerned, and that the proceeds of such sale should be applied, firstly, to the liquidation of the debt and costs due to Westerfield; secondly, to the payment of such sum as English might admit to be due to Montelius and Fuller; and thirdly, the balance, if any, to be paid over to English.

Westerfield being regarded as in doubtful circumstances, and the defendants being his creditors, they proposed to take the place of Heard in respect to the purchase, and subsequent disposition of the property, and it was assented to by English, "the understanding between all the parties being, that they would all use their exertions to get as good a price for the lands as possible, if it should become necessary to sell them in August." Accordingly, at the sheriff's sale in April, the defendants bid off the land in a lump, at the sum of seven hundred and seventy five dollars, theirs being the only bid made. They paid nothing to the sheriff or to Westerfield's attorney, upon their bid, although it exceeded the sum which Westerfield owed them, but nevertheless obtained the sheriff's deed for the lands. Soon after the sheriff's sale, in April, a written instrument, reciting the nature and terms of the agreement alluded to, was prepared and presented to the defendants, who, in their answer, attempt to excuse themselves for not signing it, by alleging that they never agreed to execute any *written* agreement of the kind. On the first Monday in August, the defendants, with the concurrence of English, resold the property at public auction, upon terms that eight hundred dollars of

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the purchase money should be paid in hand, and the balance payable in twelve months, the purchaser paying interest at the rate of ten per cent per annum. The defendants became the purchasers at the sum of eight hundred and ten dollars, but immediately sold it to one Brown, pursuant to a previous arrangement, for a thousand dollars, five hundred in hand, with the balance in 12 months with ten per cent interest. The decree of the circuit Judge was for the excess, (\$190,) and from that decree, the defendants have appealed to this court.

Brown testifies, that but for the arrangement which he previously made with the defendants, he would have endeavored to have provided himself with money enough to have been a competing bidder at the sale, and it is elsewhere testified, that previous to the first sale, he had offered English a thousand dollars for the land, which had been refused, and that this fact was also known to the defendants; and that while Brown and themselves were in treaty (so to speak,) for the ultimate purchase of the land from them at a thousand dollars, they sent him a message by his friend, suggesting that he should not bid for, or procure any other person to bid for the land, as they could purchase it cheaper than any one else. Eight hundred of the 810 dollars, for which they bid in the land, was exhausted by the execution of Westerfield, and they executed their note for the remaining ten dollars in favor of Montelius and Fuller, in accordance with the understanding already adverted to.

The question here is, whether that discharged them from the duties they had assumed, or whether, as decreed by the circuit Judge, they are liable for the whole sum for which the land was sold to Brown. We cannot well perceive how the judge below could have decreed less than he did, being the mere *principal* of the excess which came to the hands of the defendants, out of the first property, over and above the sum they have paid over. Taking the place of Heard, who was the *attorney*, and who had also specifically agreed to become the *trustee* of all the parties in interest, bearing the statute of frauds and perjuries, they could not stand below the grade of trustees of an express trust, and their conduct and their *answer* not only virtually admits that relation, but places the case beyond the mischief, and hence beyond the operation of the statute alluded to. The answer and the testimony also disclose, that they *acted* upon, and were *availed* of the agreement, in every preliminary and particular, except in paying over the proceeds of the conditional and final sale now sued for. Paying no money, yet obtaining a clear deed at the sale in April, is but corroborative of the whole tenor of the testimony, namely, that they were confided in as the trustees of the various parties

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in interest, the plaintiffs and themselves inclusive. Persons thus entrusted, and thus assuming to act for the benefit of others, *cannot* act for *themselves*, so long as the ordinary signification attaches to ordinary words. Not only is the idea itself confused and irreconcilable, but if countenanced at all, neither chancellors nor juries could adjust a limitation to its pernicious, ramified and fraudulent effects. The rule should therefore remain as it is; holding agents or trustees to sincerity and *singleness* of purpose and of action—doing and performing for those who confide in them as though they were doing for themselves—and a court of equity, especially, would be derilect to the high duty which is imposed upon it, were it to either forego the patient labor or the moral firmness which is sometimes necessary, in order to unravel and overturn the various specious arrangements and devices, (direct and indirect,) which are either resorted to or acquiesced in, looking to an advantage merely *personal* in derogation of the strict and conscientious fidelity alluded to.

Decree affirmed with costs.

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A sheriff to whom a *capias* was issued, returned: "This execution is returned not satisfied, there being no property of D found in B county whereon to levy and make the same, and the said D having taken the benefit of the bankrupt law." The writ was delivered to the sheriff sixty days before D made his application for the benefit of the bankrupt law of 1842. Plaintiffs instituted suit upon the sheriff's bond for his failure to arrest D.

Held:

1. That D was protected from arrest from and after the time of filing his application to the bankrupt court.
2. That the sheriff had until the day of the return of the writ to execute it; and it devolved upon the plaintiffs to prove special circumstances to show that the sheriff was guilty of negligence between the period of the issuance of the writ and the application of D to the bankrupt court.
3. That it was competent for the sheriff (to show his inability to execute the writ) to prove that D was not in his county from the date of the writ to the time of filing his application to the bankrupt court.

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## ERROR TO BOONE CIRCUIT COURT.

## STATEMENT OF THE CASE.

The statement of this action fully appears in vol. 9, Mo. Rep. After the decision in that case, the cause was remanded and re-docketed for trial; and at the August term, 1848, came to trial upon the same state of pleadings. The plaintiffs gave evidence of the sheriff's bond, of the proceedings, judgment, and several executions against defendant, Dale, under McMahan & Huston's judgment, upon which the sheriff, Hamilton, principal, returned no goods; and the plurius execution dated 20th April, 1842, with a clause of *capias*, and the return, viz: "This execution is returned not satisfied, there being no property of Jesse B. Dale found in Boone county whereon to levy and make the same, and the said Dale having taken the benefit of the bankrupt law." August 15th, 1842, F. A. Hamilton, sheriff," and there closed.

The defendants offered to prove the inability of the sheriff to take the defendant, Dale's body, by reason of Dale's non residence in the county, and his evasion of the service by escaping from the county. This was objected to and rejected by the court. They offered evidence of the application of Jesse B Dale, by filing his petition on the 20th June, 1842, with the district court clerk of the U. States, to be allowed to take the benefit of the bankrupt laws of the U. States, and the subsequent proceedings of the court. The plaintiffs objected to it as incompetent, irrelevant, and not legally certified. The objection was overruled and the testimony admitted, to which exception was taken. This record contained the petition of Dale of the 20th June, 1842, oath taken before the clerk of that court of same date, a list of debts due, and an inventory of his property and his credits, an order of the clerk putting the application for hearing and ordering publication of it. After continuances till March term, 1844, when he was declared a bankrupt, and a final hearing fixed for next term, at which time a continuance was made for want of publication until March term, 1845. This was closed by the certificate of the clerk of its being a full record in the case, up to the 23rd of October, 1845, the date of his certificate. A certificate of final discharge was offered at the March term, 1845, attested by the clerk. This was all defendant's evidence.

The plaintiffs asked the following instructions, which were refused, and the opinion of the court excepted to:

1. "That although the jury find that Dale applied for the benefit of the bankrupt law on the 20th June, 1842, and proceeded regularly to final discharge, yet the return is evidence to show that there was full time prior to the application to have executed the *casu*, and is evidence of negligence in the sheriff."

2. "That pending the execution, being in force in the hands of the sheriff, no application for the benefit of the bankrupt law can avail the officer as an excuse for serving the writ; such application is a fraud against the creditor in such execution."

The defendants asked this instruction, which the court gave and the plaintiffs excepted.

"If the jury believe that during the existence of the execution given in evidence, and on the 20th June, 1842, Dale applied for the benefit of the bankrupt law of the United States; and that it was so proceeded on said application that he was afterwards, in March, 1845, duly discharged in pursuance of said act, the jury must find for the defendants, unless the sheriff was guilty of a breach of duty in not seizing the body of the defendant before that time; and there is no evidence of such breach of duty before the jury."

The plaintiffs thereupon took a non suit, and moved to set it aside, which motion was overruled, and the case brought to this court by writ of error.

## TODD for plaintiffs in error.

1. The record of the district court, Mo. District, is not duly authenticated. 1. A partial

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transcript is offered of part of the proceedings. 2. An original certificate of final discharge, it not being in full of all proceedings. It is incompetent. 1. It shows no discharge or action of the court within the time the execution was in the officers hands. 2. It shows an application after the acts of neglect in the officer.

2. The instructions given were illegal. 1. The sheriff is bound to use all reasonable efforts to execute process. 10 Wend. 367. 2. Notice of the fact of defendants having no goods by his former return, and a ca-sa given him to execute, is reason for increased diligence, so as to save the debt. 15 Conn. Rep. 51. 3. The return of the sheriff admits the residence of the debtor defendant in the county, and of the fact of time to execute it. 4. The excuse for not seizing the body of the debtor, "that he had taken the benefit of the bankrupt law," is not proven true by an application, 60 days after the writ was received, to obtain the benefit of the bankrupt law. 5. If the excuse is not true in fact, the negligence of the officer is complete. 6. The negligence is fixed, even if application is made after a time admitted to have been sufficient to have found defendant debtor, and to have executed the process. 9 Mo. Rep. 24, 41, 791; 3rd Ala. Rep. 28; 1 Day, 128. 7. If any acts of negligence were proven, the facts should have been left with the jury.

### LEONARD for defendant in error.

1. The execution and sheriff's return thereon are not *prima facie* evidence of negligence on the part of the officer. This suit is for the sheriff's neglect in taking Dale's body in execution, and not for an insufficient return. In the first case, the sheriff is liable by statute for the whole debt. (Rev. Statutes of 1835, p. 260, sec. 52.) In the other he is liable only for the damages actually sustained.

The presumption of law is, that the sheriff did his duty; and here there is no evidence that Dale's body was within the county, or that it could have been taken by the use of the utmost diligence, unless it is contained in the sheriff's return.

Now admitting that the sheriff's return imports, as against himself, absolute verity (which by the bye is not always true, Bridges vs. Walford, 6 Maul & Selvin Rep. 42; Baker vs. McDuffie, 23 Wend. Rep. 291; Canada vs. Southwick, 16 Pick. 553, Williams vs. Cheeseborough, 4 Conn. Rep. 368,) yet it does not stop him from insisting upon any matter not inconsistent with the return. (Evans vs. Davis, 3 B. Mun. R. 344; Boynton vs. Willard, 10 Pick. Rep. 169, 170.) Nor does the return import that if it be insufficient in law, there is no legal excuse for the officer's failure to execute the writ, and that he has been guilty of negligence. If this were so, the plaintiff in a suit for the neglect to take the body, where the recovery is the whole debt, succeeds by proving an insufficient return when the recovery is the actual damage sustained.

2. Dale's application for the benefit of the bankrupt act protected his body from execution during the pendency of that proceeding, and excuses the sheriff's omission to take his body after his application, and the proceedings in bankruptcy were entitled to be read in evidence upon the certificate of the clerk, under the seal of the court. Pepoon vs. Jenkins, 2 John. cases, 119; Womack vs. McDearman, 7 Port. Rep. 514.

3. The mere fact that the execution was in the sheriff's hands sixty days before the defendant's application to the district court, does not of itself make out a *prima facie* case of negligence on the part of the sheriff. The presumption is that the sheriff did his duty, and the burden of proving that he did not is on him who makes the alleged misconduct the ground of his action. The defendant may not have been in the county during the time, or if there, may have so concealed himself as to have escaped the most vigilant search. Besides, if Dale were in the county during all this time, in the absence of all direction from the creditor, or of knowledge on the part of the officer of danger resulting from delay, the sheriff had a right to serve the process at any time within the period prescribed by law. Tucker vs. Bradley, 15 Conn. Rep. 46.



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NAPTON, J., delivered the opinion of the court.

We think the instruction given by the court was correct.

A sheriff has the whole period of the running of the writ within which to execute it, and if it is executed by the return day it is sufficient. This we understand to be the general and usual duty of the officer. There may be circumstances, however, under which he would not be justified in postponing for a day the levy of his writ. The condition of things may be such as to require immediate steps on the part of the officer to make the process available. The case of *Douglass vs Baker* (9 Mo. R. 41) was an instance of this character. There, the plaintiff in the execution, which was a *capias*, pointed out the defendant and required the officer to arrest him. So in any case, I apprehend, where the plaintiff will show property to the officer liable to the writ, and there is a propriety or necessity for an immediate levy, a failure of the officer to comply with such directions would be proof of negligence and hold him responsible for its consequences. In this case the plaintiff offered no such proof. On the contrary, the defendants offered to prove that Dale was not within the county or within reach of the officer prior to the 20th June, when the application for the benefit of the Bankrupt act was made. This proof was not admitted, doubtless upon the idea that the burthen of proving the negligence devolved upon the plaintiff. Had the proof been allowed, I do not think its introduction would at all have conflicted with the return, or with the principle adopted by this court in *Boone county vs Lowry*. That was a case where a sheriff returned a levy and a rescue, and finding that the rescue would not relieve him from responsibility, he offered to prove that the property he had levied on did not belong to the defendant in the execution.—Such proof, to say the least, would operate as a surprise upon the plaintiff. He might be expected to prepare for disproving a rescue or for denying its validity as a defence, if proved, but he could not anticipate the new ground for the first time assumed on the trial. The new defence contradicted his return, which admitted the goods levied on to have been the property of the defendant in the execution.

The case of *Boone county vs Lowry* was no doubt *stricti juris*; but its hardship arose from the retention of the ancient severity of the law which regulated the responsibility of sheriffs. The theory of the common law, upon which this strictness against rescues depended, that the officer could always prevent a rescue by exercising the power with which he was invested over the *posse comitatus*, is a mere theory in this age and in this country. To practice it in all cases might lead to la-



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mentable consequences, and in our sparse population it may in truth be justly regarded impracticable. The law in this respect might be advantageously changed; but the court could not relieve against its hardship. The rule in Boone county vs Lowry, if applied to a different set of circumstances, would be highly equitable in its operations.

The evidence offered by the defendant in the present case did not conflict with nor contradict the return; it tended to establish its sufficiency, or rather to fill up a hiatus in the defence left by the return itself. The defendant, it will be observed, was not sued for an insufficient return, but for a failure to levy. The failure was admitted; but the excuse was that the defendant in the execution was a bankrupt and this excuse was set up in the return. This excuse might or might not constitute a full answer to the charge, according to circumstances, and the defendant, after proving the existence of the bankruptcy, proposed to go further and show circumstances, which, under the most harsh construction of the law, would totally exonerate him. I confess my impression is that the defendant might have completed his defence in this way.

This matter is however immaterial. The evidence offered was excluded and as it was excluded at the plaintiffs instance, he of course cannot object. The instruction stands upon the maxim of law that an officer is presumed to have done his duty until the contrary appears. The defendant had proved the bankruptcy; but the bankruptcy did not cover the entire period from the issuance of the writ until its return. There were two months during which the sheriff might have been required to execute the writ. The instruction assumed the law to be, that the sheriff had until the return day to execute his writ, and nothing appearing to the contrary, the presumption would be that no negligence had occurred up to the day when the defendant in the execution protected himself from arrest by his petition to the bankrupt court. If there were any special circumstances to show a dereliction of duty on the part of the sheriff, it devolved upon the plaintiff to show them.

Had the court admitted the testimony offered by the defendant, the result would have been the same, the plaintiff declining to offer any evidence.

The objection to the records of the District court in the bankruptcy case is not material in any point of view. No objection was made to the authentication of the record, but merely to its incompleteness. The only object of the record was to show the time when the application was made, and this was shown as well by a record obtained before the proceedings were completed as afterwards. The record was complete

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in fact. It purported to give a full record of every thing which had transpired in the court up to its date, and it was of no consequence in this case that the record was procured before the final judgment of the court. But the certificate of discharge itself showed the date of the application, and the record was therefore useless, and its admission or exclusion could have been of no consequence in the case.

The other Judges concurring the judgment is affirmed.

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**HAMILTON EX'R. OF TAYLOR vs. LEWIS, PUB. ADM'R. OF RAY  
COUNTY, ET AL.**

1. John Taylor made amongst others, the following provisions in his will: "Sec 7. I leave and bequeath to my grand-son, John Hill, the west half of the north-east quarter of Section 27, Town. 51, Range 29; *also one negro boy named Clark, (son of Nell,) to be given into his possession when he arrives at the age of twenty one years, to him and his heirs forever.*"
  - Sec. 9. I will that all my personal property of every kind, not otherwise disposed of, be sold as soon as practicable, after my death, on a credit of twelve months, my executor taking bond and approved security; and from the proceeds thereof and the money in hand at my death, I desire that all my just debts be paid, and the balance, if any, to be *equally divided amongst my children, and grand children, each grand child drawing their equal proportion of what their ancestors would have drawn had they have lived.*
  - Sec. 11. There are yet three negroes not disposed of, to wit: James, Nell, and Tom. It is my will that they be hired by my executor, in the county of Ray, either at public auction or privately, as my executor may think most advisable, every year from my death, until my grand son John Hill, comes to the age of twenty-one years; then it is my will that they be sold, &c. &c., and the proceeds arising from such sale, to be equally divided amongst my children and grand children, as before directed, in the ninth article of this will.
- Held,
1. That the legacy mentioned in the 7th article, is a *vested* one; and that the hire of the slave Clark, from the death of the testator, passed with the slave to the legatee: a fund having been otherwise provided for the payment of the debts and expenses.
  2. That by the 9th article, the grand children take *per stirpes*, that is the share of the deceased parent.
  3. That the sale of the slaves mentioned in the 11th article, and division of the proceeds as therein directed, could not be made until the period at which John Hill would attain to the age of twenty-one years. The postponment being made on account of the condition of a majority of the legatees, the death of John Hill during his minority would not change the period fixed in the will for the sale and division.

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## APPEAL FROM LAFAYETTE CIRCUIT COURT.

## STATEMENT OF THE CASE.

The facts of this case as presented by the record and agreed by the parties are as follows, to wit: On the 11th day of August, in the year of our Lord 1842, the said John Taylor made and published his last will and testament, and within a short time thereafter, died.

The provisions of his will in the construction of which the several questions involved in the cause arise, are these:

"Section 7. I leave and bequeath to my grand son John Hill, the west half of the north-east quarter of section twenty-seven, township fifty-one, range twenty-nine; also one negro boy named Clark, (son of Nell) to be given into his possession when he arrives at the age of twenty-one years, to him and his heirs forever.

"Section 9. I will that all my personal property, of every kind, not otherwise disposed of, be sold as soon as practicable after my death, on a credit of twelve months, my executor taking bond and approved security; and from the proceeds thereof and the money in hand at my death, I desire that all my just debts be paid, and the balance, if any, to be equally divided amongst my children, and grand children, each grand child drawing their equal proportion of what their ancestor would have drawn had they have lived."

"Sec. 11. There are yet three negroes not disposed of, to wit: James, Nell and Tom. It is my will that they be hired by my executor, in the county of Ray, either at public auction or privately, as my executor may think most advisable, every year from my death, until my grand son John Hill comes to the age of twenty-one years *old*; then it is my will that they be sold, and they are to be permitted to choose any master who will give the appraised value of them on that day, if any be there, and if not they are to be sold to the highest bidder, and the proceeds arising from such sale to be equally divided amongst my children and grand children as before directed in the 9th article of this will."

The testator in his life time had issue, five children, of whom three, to wit, Edmond B. Taylor, Obadiah Taylor and Nancy Peak, were living at the time of the death of the testator, and two, to wit, Lydia Hill and Wenney Bright died in the life time of the testator. The said Lydia had been twice married, first to one Gourd, by whom she had issue, Zerinda Spencer and Rebecca Gourd, both mentioned in the will; and secondly, to the plaintiff below, Ephraim Hill, by whom she had issue, the plaintiff below Nancy Cates, wife of the plaintiff below, William Cates and John Hill, mentioned in the foregoing provisions of the will, all four of whom were living at the time of the testator's death. The said John Hill afterwards died an infant and intestate, having survived the said Rebecca Gourd who had died without issue. If the said John Hill had continued to live he would not be twenty-one years old until the first day of January, in the year of our Lord 1854. The said Winney Bright, left issue, Jefferson Bright, Rebecca Bright and Sarah Bright, who were living at the time of the testator's death, and are all mentioned in the will. The said Jefferson Bright is still living, and the said Reuben Bright and Sarah Bright have both died since the death of the testator. Since the death of the testator, and before the commencement of this suit, the said Edmond B. Taylor and Obadiah Taylor have both died, severally leaving issue who are yet living. The said Ephraim Hill is the father, and the other plaintiffs below and Zerilda Spencer are the remaining legal representatives of the said John Hill.

The said Nancy Cates, formerly Nancy Hill, has intermarried with the said William Cates since the death of the testator. The said Nancy Peak is still living. The several slaves mentioned in the 7th and 11th sections of the will are yet living; and the said Nell has had three children since the death of the testator who are likewise still living. All of said slaves are under the direction and control of the defendant below, as executor aforesaid.

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The plaintiffs below as the legal representatives of the said John Hill, instituted this proceeding in the county court of Ray county, and that court upon the hearing of the cause, made an order directing and requiring the defendant below, as executor of said will and testament to deliver up to the plaintiffs below, as the legal representatives aforesaid, the negro slave Clark, mentioned in the 17th section of said will, and also, to proceed to the immediate sale of the slaves James, Nell and Tom, mentioned in the said 11th section, and to divide the proceeds of such sale, together with the proceeds of their hire, among the children and grandchildren of the testator, in the proportions prescribed in the 9th section. From this order the plaintiff in error appealed to the circuit court of the same county; and afterwards a change of venue was awarded to the circuit court of Lafayette county.

Upon the trial of the cause in the latter court all objection to the parties, to the suit, to the form thereof and to the manner of proceeding therein up to that time were mutually waived and abandoned. It was also then agreed that all the parties in interest had been duly notified of the application. It was also then agreed that the cause should be prosecuted for the purpose of judicially ascertaining and fixing the bequests, rights and interests of the plaintiffs below under the said will, and the time when payment, apportionments, possession and distribution of the same ought to be made by the said executor. The will, which is copied in the record was admitted and read in evidence. Upon this state of case the defendant below, by his counsel, prayed the court to declare the law of said cause to be as follows, to wit:

"1. That although the bequest made to John Hill, by the 7th section of the will in question may have vested in him at the death of the testator, and is therefore transmissible to the legal representatives of such legatee, yet such representatives are not entitled to the possession of such bequest until the arrival of the time at which the said John Hill would be twenty-one years old, if living.

"2. That the 11th section of said will passed no substantive bequest to the said John Hill, claimants under that section connected with the 9th, to which it refers, can only prevail under the direction of the will to divide among the children and grand children of the testator. These sections describe certain classes of persons, to wit: the children and grand children of the testator, among whom the proceeds of the sale of the three slaves, mentioned in said 11th section are to be divided by the executor after said Hill should obtain the age of twenty-one years. The legal instrument of the testator is, that his children and grand children, living at the time at which such division is directed to be made, shall take to the exclusion of all others. John Hill having died before such time, his representatives can take nothing under these sections.

"3. That although there may have been a bequest to the said John Hill, under the said last mentioned sections of said will, yet such bequest was contingent and lapsed by the death of such legatee before the time of vesting had arrived.

"4. That the representatives of the said John Hill, have no right to claim or require a sale of said three negroes, nor a division of the proceeds of such sale, before the time comes at which the said John would be 21 years old, if living.

"5. That the proceeds of the hire of the slaves James, Nell and Tom, mentioned in the 11th section of the said will, occurring since the death of the testator, are not disposed of by the said will."

The court refused to make these several declarations of law in the cause, and each of them; and thereupon the defendant below excepted.

The court then declared the law of the cause, arising from the facts aforesaid, to be for the plaintiffs below, and proceeded to make and render the final order and judgment upon the record, to which the defendant below also excepted. The defendant below then moved for a new trial, which was refused. To the overruling of the said motion the defendant excepted. The cause is in this court by appeal.

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HAMILTON, Ex'r. of TAYLOR, vs. LEWIS, Pub. Adm'r. of RAY COUNTY.

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### EDWARDS, for appellant.

1. Under the 11th section of the will, connected with the 9th, to which it refers, there is no substantive bequest to John Hill, the intestate of the plaintiffs below. If he were still living, and the time for final disposition of the property in question had come, he could only claim under the direction of the executor contained in the will, to make payment or division among the children and grand children of the testator. These are two classes of persons, or as the old lawyers phrase it, *nomen collectivum*, within one of which the claimant must bring himself before he can take a dividend. 4 Bac. Abr. 394, 395, 396; Batsford vs. Kebbell, 3 Ves. Junr. 363; Sansbury vs. Read, 12 Ves. Junr. 75.

It is conceded that where the testator gives legacies to his children and grand children generally, these descriptions apply to those *in esse* at the time of the making of the will. 4 Bac. Abr. 341. It is also conceded that where there is no bequest of a sum generally to be divided among a class of persons, those of such class who are in being at the death of the testator, shall take. 4 Bac. Abr. 342. But where a testator gives a legacy to any one not as *persona designata*, but under a qualification or description at any particular time, the person answering such description at that time is the person to claim. And where a fund is directed to be divided at any future time among a class of persons, those of such class who are *in esse* at the time such division is directed to be made, take to the exclusion of the representatives of such as are deceased, and all others. Pemberton vs. Park, 5 Binn. Rep. 607; Lamb vs. Lamb, 8 Watts Rep. 184; Moore vs. Smith, 9 Watts Rep. 403; Gregg vs. Bethea, 6 Port. Rep. 9.

2. If the testator, by these sections, meant children and grand children living at the date of his will or at the time of his decease, and there was a substantive bequest to the intestate of the plaintiffs below, then it is submitted that such bequest was contingent and has lapsed by his death before the time of vesting either in possession or interest. Toller's Law of Executors, 304; 4 Bac. Abr. 393, 394, 395, 396, 401; 2 Williams on Executors, 886; 3 Ves. Junr. 362; 1 Roper on Legacies, 583.

3. If the will passed a legacy, whether vested or contingent to the intestate of the plaintiffs below, then it is argued, that his representatives cannot claim the possession or payment of such legacy, before the time at which he would have been twenty-one years old if living; and this proposition embraces the provision of the seventh as well as of the eleventh section. 4 Bac. Abr. 434; (6 Bac. Abr. by Bouvier, 312, 313); 1 Chit. Black. 430, 1; 2 Mad. Chan. Prac. 13, 14; 2 Pierre William's Rep. 335, 478; Fonblanquis Eq. 602 note; 2 William's Executors 881; 2 Toll, Law of Executors, 313.

4. The proceeds of the hire of the slaves in question, are not disposed of by the will. They belong to the executor, either beneficially or in trust for the next of the kin of the testator. He is not authorised to dispose of the proceeds of such hire with the proceeds of the sale which he is directed to make. Toll, Law of Executors, 351 and following; 6 Bac. Abr. "by Bouvier," 302 and following; 1 Chit. Black. 434 and note, (46); 2 P. Williams, 337.

5. The whole will evinces that the testator postponed the time of distribution of his estate in view of its condition, and for its accumulation under the management of his executor, and not in reference to the condition of the legatees, or any of them.

### HAYDEN for appellee.

1. Immediately upon the death of the testator, John Taylor, his grand son, John Hill, became entitled to the slave, Clark, and other property mentioned in the 7th article of the will of the said John Taylor; and to an undivided and vested interest, as a grand child of the testator, in the property specified in the 11th article or section of said will; and upon the death of him, the said John Hill, his legal representatives became entitled to the same.

As to vested legacies, see 1 Roper on Legacies, chap. 10, sec. 2, pp. 376, 377 and following.



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and notes of reference there; *ib.* 414; 3 Ves. 10, 16; 1 Bur. 228, 232; 6 Bacon, 264 Rule, 2d; 216, C 1 and 2, 315, 316, 241, 312, 317, (Bouvier's edition.) See 4 Bac. (Wilson's edition) 393, (letter E, section 2) 391 and following, title "Legacies," as to whom legacies payable at a future time shall be said to be vested or lapsed, the legatee dying before the time of the payment.

As to the description of legatees, see 1 Roper on Legacies, chap. 2, sec. 1, pp. 45, 46, 47, 48, 49, 50, &c., and authorities there referred to.

Of legacies *upon condition*, see 1 Roper on Legacies, 499 to 513 and following.

2. That the provisions in the 7th and 11th articles or sections of the will, fixing the majority of John Hill as the point of time at which he was to receive the possession of the property mentioned therein, and for the sale and division of the property mentioned in the 11th section of the will amongst his children and grand children, as specified in the 9th article of it, was evidently made and designed by the testator for the benefit of John Hill, and for the security of the estate there given him, to be managed and enjoyed at a time when, from the maturity of his age, he would be capable of preserving and increasing it; and that, therefore, there is no reason now existing why his legal representatives should not have the possession and enjoyment of the property, &c., bequeathed him in the will. The rule in equity as to the time of payment of a legacy, is that if the legacy draw interest, or if the payment of it be delayed until the majority of the legatee, or until some fixed point of time after the death of the testator, on account of, and for the interest and benefit of such minor, and not on account of or for the reason that, in the judgment of the testator, his estate could not bear the payment of it earlier. Then, although the legatee should die whilst a minor, or before the time fixed for the payment of it, his legal representatives become entitled to the possession and present enjoyment of the legacies at the time of his death; and the circuit court very properly ordered and decided a distribution of the same amongst the plaintiffs below.

As to what time legacies are to be paid, see 4 Bac. 434, 435, (Wilson's edition,) 1 Strange, 238; Ambl. 588; Green vs. Pigot, 1 Br. Ch. Rep. 105, 106, side paging; 2 Verm. 431; 3 Vesey, 16, Cricket vs. Dolby; 2 Verm. 430, Phillips vs. Phillips.

NAPTON, J., delivered the opinion of the court.

The principal questions in this case depend upon the construction of the 9th article of the will, upon which the 11th article is based. The 9th article directs certain property to be sold for the payment of the testator's debts and "the balance, if any, *to be equally divided amongst his children and grand-children, each grand-child having their equal proportion of what their ancestor would have drawn, had they have lived.*"

We entertain no doubt as to the meaning of this clause. The deposition intended is precisely that which the statute of distributions would have made, had the will been silent. The words children and grand-children are not intended to designate the persons who would take, but those classes are named merely because at the making of the will they embraced all those persons who constituted his heirs at law. It was evidently not the intention of the testator that all his grand-children should take, whether they were living at the death of the testator, or at



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the period when the legacy would vest. His grand children, who had parents living at the time when the legacy vested, would not take, although coming within the very words of the will. It could never be supposed for a moment, that the children of O. Taylor and E. B. Taylor, who were the testators grand-children, should take under the 9th clause as well as their fathers, who would certainly take as children of the testator. This results from the last clause of the article, where it is clearly indicated that the grand-children are to take *per stirpes* and not *per capita*. Children and grand-children are mentioned, they being the only persons who would be benefitted by the legacy at the time of the testator's writing; but the grand-children were not to take *per capita*, and would only receive the share of their deceased ancestor; and if the grand-children were also dead, leaving issue, the design was that this issue, although not coming within either designation of children or grand-children, should take the share of the deceased grand-child.

As matters now stand, according to the agreed case in the bill of exceptions, it is of no consequence to determine whether the legacy mentioned in the 11th article of the will be vested or lapsed, so far as the deceased grand-children, John Hill and Rebecca Gourd are concerned. These grand-children left no issue, and their heirs would be the same persons who would take under the statute of distributions, if the legacy be regarded as lapsed. The eleventh clause directed the proceeds of certain sales, after the payment of debts, to be divided among his children and grand-children as before directed in article 9, and according to our views of the proper construction of article 9, this residuum, whether the legacy be considered as vested or lapsed, would take the same direction which the statute of distributions would have given it.

In relation to the legacy mentioned in the 7th article of the will, it is clearly a vested one. The testator gives to his grand-son, John Hill, a slave named Clark, "to be given into his possession when he arrives at the age of twenty-one years—to him and his heirs forever." The delivery of the slave is merely deferred on account of the minority of the legatee. The cases are uniform in regarding such a legacy as vested.

There are several other questions presented by the agreed case, of minor importance to the parties in interest, but really of more difficult solution.

1. Does the hire of Clark, the slave bequeathed to John Hill by the 7th article, go to the heirs of J. Hill, or fall into the mass of the estate to be distributed to those entitled under our act of descents and distri-

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butions? As a general rule a legacy only carries interest from the time it is payable. *Davis vs. Swan* 4 Mass. R. 208. An exception to this rule is, where the legacy is given to a minor whom the testator was under a moral obligation to support, and for whose support no other provision was made in the will. This rule of course applies to minor children, and according to some authorities, it equally embraces grand-children. 14 Serg. and Rawl. 241. No pecuniary legacy was bequeathed to John Hill, but a tract of land and the slave Clark. A fund was provided for raising money to pay off the debts and expenses, and in the surplus of this fund, if any there should be, all those entitled to distribution were to share equally. All the grand-children of the testator, whose parents were dead, were provided for in a similar mode to that made for John Hill, and the whole tenor of the will indicates the disposition of the testator to make as equal a division of his estate as practicable among those who would under the law have been entitled to his bounty. We consider that the hire of a slave would go to the specific legatee of that slave, whenever the interest of a pecuniary legacy, similarly disposed of would go with the principal. As an ample fund was set apart for debts and expenses, we cannot doubt that it was the design of the testator to let the specific legacies to his minor grand-children carry interest, where they were money, and that the hire of the slaves (where they were of a suitable age to be hired) should go with the slaves. We find no objection therefore to the order of the circuit court on this point.

2. What becomes of the hire of the slaves Nell, Tom &c., mentioned in the eleventh section, and in relation to which the will is silent? On this point we can see no possible objection to the order of the circuit court. It is perfectly useless to enquire whether the hire of these slaves would necessarily go with the slaves or their proceeds, under the circumstances. For the testator has, in the 11th section, made the same disposition of this property which our statute of distributions would have made. Whether the hire be considered as disposed of by the same clause which disposes of the slaves, or be regarded as a part of the estate not mentioned in the will, the same result is attained. The order of distribution made by the circuit court was right, under either view of the case.

3. The only question remaining to be considered, is the *time* when the court is authorized to have the slaves mentioned in the 11th article of the will sold, and their proceeds distributed. The rule is, that where the period of payment of a legacy is postponed merely on account of the condition of the legatee and the legatee dies before the period arrives,

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the legacy being a vested one, is payable immediately to the heirs of the legatee. But where a legacy is postponed on account of the condition of the estate, the rule is different. Here it is not very apparent what design was in the view of the testator in deferring the sale of these slaves until the time when his grand-son John Hill, should attain 21 years. It would seem that accumulation was not his object, since he made no mention of the hire, but only the proceeds of their sale. It is certain, however, that the payment was not deferred *solely* on account of the infancy of John Hill; for John Hill was not the only legatee under this clause, but all his children and grand-children. Now three of his children were already heads of families, and so far as they were concerned, John Hill's minority could not influence the legacy designed for them. I should think it most probable, that the period of John Hill's minority was selected as the time for disposing of the slaves and paying over the proceeds, on account of the condition of the majority of the legatees, who were infants, and the year 1854, was selected as the time when the majority of his grand-children, perhaps all of them would be at such an age as the testator thought would enable them to make a judicious use of the legacy. It is clear that this reason is not removed by the death of John Hill, before attaining twenty-one. He was one out of seven grand-children coming within the terms of the provision. We can see no authority then in the circuit court to change the period fixed in the will for the sale of the slaves mentioned in the 11th article. With this exception we concur in the construction given by that court to the will. The judgment will therefore be reversed, and the cause remanded, with directions that the order be altered in the particular suggested.

Judgment reversed.

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1. Although an agent at the time he makes a verbal contract discloses to the other party his agency, and gives the name of his principal it does not necessarily follow that he is not personally liable. Whether the credit was given to the agent or to his principal is in such cases a question of fact to be determined by a jury from the conversation and acts of the parties at the time of making the contract.

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2. It is improper for the circuit court to give an instruction to the jury which is calculated to mislead.
3. In the construction of agreements, courts must look to the objects which the parties have in view, and a substantial compliance with the obligations assumed, is all that is required.

## APPEAL FROM JACKSON CIRCUIT COURT.

## STATEMENT OF THE CASE.

This was an action of assumpsit, brought by Thomas Pitcher against J. Brown Hovey to the March term of the Jackson circuit court 1848. The declaration contained four special counts and a common count for money paid.

The first count charges that Pitcher, as sheriff of Jackson county was about to offer a reward of three hundred dollars for the apprehension and delivery of John H. Harper (a prisoner who had escaped from custody,) at the jail of Jackson county, and that Hovey agreed with Pitcher that if he would offer a reward of \$500, instead of \$300, that he, Hovey would pay Pitcher \$200 in case Pitcher by reason of offering the reward should become liable to pay it. That Pitcher accordingly offered the reward of \$500, for the apprehension and delivery of said Harper at the jail of Jackson county, by handbills and advertisement in a newspaper. That afterwards said Harper was taken by one Marcellus Duval and by him and his agents brought back to the jail of Jackson county, and that thereupon Pitcher became liable to pay Duval the \$500, and did pay him that sum. Notice of payment is averred, and the count then charges that by reason of the premises the defendant became liable to pay the plaintiff \$200, on request &c.

The second count charges the same facts as to the agreement and the offer of the reward and then alleges that Harper was afterwards apprehended by Marcellus Duval and by him and one Nicholas A. Prior brought back as far as Springfield, towards the jail of Jackson county, and that the then sheriff of Jackson county there met them and took Harper away from them by virtue of a bench warrant, and conveyed him to the jail of Jackson county &c., and this count then alleges that by reason of the premises, Pitcher became liable to pay \$500, to Duval and Prior, and did pay it, and that Hovey thereupon became liable to pay Pitcher the \$200, on request &c.

The third count charges the same facts as the second with this exception, that it sets up a contract as of a reward for the apprehension alone, and not the apprehension and delivery of Harper at the jail of Jackson county, and averse payment by Pitcher to Duval and Prior at Springfield.

The fourth count proceeds like the third, as of a reward for the apprehension alone, and avers that plaintiff paid \$400, to Duval and Prior at Springfield, which they received in full satisfaction of the \$500, and then avers defendant's liability to pay two fifths of the \$400, on request &c.

All the special counts charge the fact that Harper, previous to his escape, had been committed to the jail, by Justices, on a charge of murder, and none of them allege a promise by defendant, upon or after the allegation of his liability to pay &c.

To this declaration the defendant plead the general issue prescribed by the acts of 1847.

At the September term 1849 the defendant moved the court to strike out the special counts for want of sufficient averment of notice, and because said counts did not aver a promise by defendant to pay, upon or after the allegation of defendant's liability. This motion was overruled by the court below and defendant excepted. This cause then came to trial by a jury, and the following testimony was introduced. John Heard, a witness for the plaintiff stated that about the 1st day of August A. D. 1846, he was called upon by plaintiff to write a notice describing the person of John H. Harper, and offering a reward for his arrest and delivery at

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the jail of Jackson county; that he consented to do so, but that about the time he commenced writing, the defendant came in and enquired what reward was to be offered! That he told defendant that plaintiff would offer three hundred dollars! Defendant said that three hundred dollars was too little, and spoke of some authority that the friends of W. W. Meredith had given him touching the case of Harper; and thinks that defendant also said that they would be willing to contribute if plaintiff would bid a larger amount. Witness told defendant that it would be unsafe for plaintiff to rely upon the friends of W. W. Meredith to pay the reward or any part of it, and suggested that he, defendant, could bid as much as he thought proper himself, for Meredith's friends. Defendant said that the fact that plaintiff was sheriff, would give weight to the bid, and make the arrest of Harper more probable, witness told defendant that he could not advise plaintiff to bid more, relying upon the friends of Meredith to pay it. Defendant then said that he would, if plaintiff would bid five hundred dollars reward, undertake, if the reward ever had to be paid, to pay two hundred dollars of it himself, and at the same time witness think she said that they, Meredith's friends, would not let him pay it, or some words to that effect. Witness then asked plaintiff if he was willing to take defendant for the two hundred dollars and offer \$500, instead of \$300. Plaintiff said he was willing, and the notice was filled with five hundred dollars. Witness stated that the following copy was the notice published by handbills and in the Western Expositor, a newspaper published in Independence.

**"\$500 REWARD!**

**STOP THE MURDERER!**

Escaped from the jail of Jackson county Mo., on the night of the 30th July, 1846, John H. Harper, who had been committed on a charge of murdering Wm. W. Meredith. Mr. Harper is about 24 years old, 5 feet 6 or 7 inches high, well made, brown hair and a heavy beard, blue eyes, a florid complexion, a plump round face, pleasing address, and very genteel appearance. He is a fine scholar and a lawyer by profession.

The above reward will be paid for the apprehension, and delivery of said Harper at the jail of Jackson county aforesaid.

Independence, August 1st 1846.

THOMAS PITCHER,  
Sheriff of Jackson county."

Witness believes that plaintiff was present all the time when the conversation above related, took place between himself and defendant,—knows he was present when defendant offered to pay \$200, as above stated. This conversation took place in the witness' office in Independence, Mo. Plaintiff at first requested witness to put \$300 into the notice as a reward, but after that conversation he told witness to make the reward \$500.

On cross examination he stated that he thinks plaintiff was present at the entire conversation—that considerable altercation took place between plaintiff and defendant, the words of which, witness does not recollect, but thinks he has stated the substance of all that took place between the parties,—that defendant assisted in describing the person of Harper and in writing the notice, but witness does not remember that defendant suggested the last clause in the notice. Thinks Hovey said that if the reward had to be paid, he would pay \$200 of it, but does not recollect any special promise to pay it to Pitcher or any other particular person. He further stated that he knew that Hovey (defendant) prosecuted Harper before the committing Justices, but did not know of his own knowledge, who employed him to do so.—That at the time of writing the notice, Hovey stated that he was authorised by the father of Meredith to take any steps that he thought necessary to bring Harper to Justice. Witness considered Hovey the attorney of the friends of Meredith.

Defendant put the following question to the witness. "Did you not, on a former trial of this cause, before the circuit court, in answer to a direct question propounded to you upon that point, by the Judge, say, that Hovey's undertaking was to pay so much of the reward to the person who should apprehend and deliver Harper at the jail of Jackson county!" To this question the witness answered. "I never stated that Hovey promised to pay the person delivering



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Harper at the jail. I may have said that my understanding was that Hovey was to pay two hundred dollars of the five hundred bid, when Harper should be delivered at the jail."

Benjamin F. Thomson, a witness for the plaintiff, stated that in the latter part of September, 1846, at the town of Springfield in this State, he saw plaintiff pay to one Prior \$400, for the arrest of John H. Harper. Prior claimed \$450 at first, which plaintiff refused to pay, because plaintiff said it was worth more than fifty dollars to bring Harper to Independence. That plaintiff, on the same evening authorised witness to say to Prior, that he would give him \$400; and on being informed of this, Prior said he would take it, and the \$400 was paid by plaintiff to Prior. That some four days previous to this payment, information was received by a letter from Prior to plaintiff, that John H. Harper had been arrested, and was in the town of Springfield in this State, detained by Duval and Prior. On reception of this information, witness went to the town of Springfield, and took with him a bench warrant and a *capias* for the arrest of said Harper; the *capias* was directed to the sheriff of Green county. He further stated, that after he arrived at Springfield, he took Harper by virtue of the bench warrant and brought him back, and put him in the county jail of Jackson county. That he did not arrest Harper nor take him in custody by virtue of the bench warrant until after plaintiff and Prior had settled upon the amount of money to be paid for the arrest of Harper, and until after the money was paid, and that no use was made of the *capias* at all. That the bench warrant was issued by the Jackson circuit court while in session at the September term, 1846. He further stated, that the plaintiff and several others went with him to Springfield at the time spoken of above, but that he does not know whether the defendant knew that plaintiff was going or not. That he and some others were in conversation with plaintiff near the court yard gate before they started from Independence to Springfield, talking over the arrest, &c., when defendant came up to the crowd and said to plaintiff, "Tom, you shan't lose," or "you shan't pay a dollar of the reward." Witness did not recollect which word was used, "lose" or "pay."

On cross examination, witness stated that the \$400 paid by plaintiff was paid for arresting and bringing Harper to Springfield. That Springfield is from 160 to 200 miles distant from Independence. That he made no charge for going to Springfield, but made a statement of going after Harper to the county court of Jackson county, and they made an order allowing to each man who went with him the sum of nine dollars. The warrant for the money was issued in witness' name, and he paid plaintiff his share, which he thinks was nine dollars.

Henry W. Younger, a witness for the plaintiff, stated that he was one of the men who went with sheriff Thomson to Springfield after Harper; that they found Harper at the latter place in the custody of one Prior, a deputy sheriff of Van Buren, Arkansas, and an Indian agent, whose name he thinks was Duval. That plaintiff, Pitcher, negotiated with the parties who had Harper in custody, by which he was to pay them four hundred dollars. That he did not see any money paid; but that Prior and the Indian agent left in the stage before day light next morning, and he knows that they had been satisfied by Pitcher. That Thomson took possession of Harper as soon as Pitcher had settled with the parties, and Harper was next morning taken by us and brought back to Independence and placed in the jail of Jackson county. We got to Springfield in the evening, and left for home next morning.

Plaintiff then read in evidence a transcript of a judgment of two justices of the peace, committing John H. Harper to the jail, to answer to the charge of murdering William Wirt Meredith.

John Kelly, a witness for the plaintiff, stated that he was jailor under plaintiff, Pitcher, when Harper was put in jail, and that Harper remained in the jail of Jackson county as long as he remained jailor. That about the latter part of July, 1846, he saw a hole in the wall of the jail, and Harper was gone from the jail, at which time the witness was not jailor.

#### DEFENDANT'S TESTIMONY.

Thomas J. Shaw, a witness for the defendant, stated that he was one of the jury which

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tried this cause before, when a non suit was taken; that John Heard was then, as now, a witness for the plaintiff, and that his best impression is, that in answer to a question asked him on that point, said John Heard said that the promise of Hovey, the defendant, was to pay two hundred dollars of the reward to the person who should apprehend and deliver Harper at the jail of Jackson county. Witness was not certain as to the precise words used by Mr. Heard, but was lead forcibly to that impression from the fact that upon Heard's answer to that question, the plaintiff took a nonsuit.

Newton J. Hockensmith, a witness for the defence, testified that immediately before the first suit between the parties, about this same matter, he went with plaintiff to the office of defendant, and after the usual salutations, plaintiff said to defendant that he had come "to see about that \$200." Defendant seemed surprised, and asked "what \$200?" Plaintiff replied, "Heard says you promised, as the attorney or agent of Meredith, that you would pay \$200 of the reward, in case I had to pay it." Defendant denied it; and said that he had never promised to pay plaintiff a cent; and then rehearsed what had taken place between himself and Heard. Defendant stated to plaintiff that on the morning after Harper escaped, Heard was about to offer a reward of \$300 for the apprehension and delivery of Harper, in the name of plaintiff, in order to save plaintiff's election, which was about to come off, supposing that plaintiff was in Saybar township electioneering, and would not be in, in time to offer it himself; and that he, defendant, told Heard that \$300 was not enough, and that he was authorized by Meredith, the father of the deceased, to do anything that might be necessary for the safe keeping or re-arrest of Harper in case of escape, and that if Heard would offer \$500, that he, defendant, would agree, as the attorney of Meredith, to pay \$200 of it, in case plaintiff did not stand up to it when he came in, and that while they were talking of it plaintiff came in himself, and offered the reward himself, only requesting of Heard and defendant, that they would draw up the notice, as they could better describe Harper than he could.

When defendant made this statement, plaintiff replied, "Heard says you did!" and seemed still to refer to Heard. Defendant then said to plaintiff: "If you had any thing against me, in any way, why have you let three or six months pass without naming it to me?" Plaintiff replied that he was waiting to see if the people would not make the reward up to him by subscription. Defendant then asked plaintiff if he had not had frequent conversations with him about the reward, and about getting the people to make it up to him, since the payment of the money at Springfield, and whether plaintiff, during all that time, had ever named such a thing as a liability on defendant's part? Plaintiff acknowledged that he had had such frequent conversations, and that he had never before named defendant's liability, &c., and gave as his reason, that he was waiting to see if the people would not make up the reward to him. Defendant then asked plaintiff if he had not had in his possession an amount of money (the amount not recollected by the witness) belonging to defendant, since Harper's re-arrest and delivery at the jail, and whether he had not paid that money over to him, defendant, without naming any liability on defendant's part to him? Plaintiff replied that he had, but still referred to Heard. Defendant then said to plaintiff, "Did I ever promise to pay you a cent in my life?" Plaintiff seemed to avoid answering this question, but still referred to Heard. Defendant then proposed to go and see Heard before bringing the suit, to which plaintiff agreed; but plaintiff did not wait to go and see Heard, but brought the suit immediately, contrary to his agreement with defendant. Witness further stated, that it was generally understood in the community that defendant was the attorney of young Meredith's friends. It was also generally understood that Meredith, the father of the deceased, was a man of wealth, and that defendant, at the time, had no visible property out of which money could be made.

On cross examination he stated that the plaintiff did not at any time during the conversation, say that Hovey had *not* made the promise to him. That he had known John Heard, the witness, several years, and that his character for truth and veracity was above suspicion.

The plaintiff proved by several witnesses that the character of John Heard for truth and

veracity was good, and on cross examination, Mr. Palmer, one of his witnesses, stated that Heard had been a partner of his in practice of law, for two years past, and that Heard's recollection of facts and circumstances was not good.

Robert G. Smart, a witness for the plaintiff, further stated that soon after Harper had been re-arrested and delivered at the jail of Jackson county, plaintiff and defendant came up to him on the street, and defendant he thinks asked his opinion about getting up a subscription to make up the reward to plaintiff; witness said to them that there had been a good deal of excitement about Harper's escape, and that they had better get up the thing quietly. Defendant then said he would give ten or twenty dollars towards it, and after some further conversation, plaintiff remarked, "I don't care how it is done, I want my money from somebody."

Upon this testimony, the plaintiff asked the following instructions:

"1st. That if the jury believe from the evidence that defendant promised plaintiff, if he, plaintiff, would offer a reward of \$500, instead of \$300, for the apprehension of said Harper, that he defendant would pay plaintiff \$200 of the reward, if he said plaintiff should have the said reward to pay; and that said plaintiff did offer the reward of \$500, for the apprehension and delivery of said Harper, at the jail of Jackson county, and that said Harper was apprehended in consequence of offering said reward; and was on the way to the jail of Jackson county, in custody of the persons who had apprehended him: and was met by the then sheriff of Jackson county before he got to said jail, and said Harper was taken out of the custody of the persons who had apprehended him, by said sheriff and conveyed to said jail; and that the persons who apprehended Harper, agreed with the plaintiff to take less than the reward offered; and that said plaintiff paid said persons who had apprehended Harper \$400, according to said agreement; then said defendant is liable to said plaintiff for four-fifths of said \$200, and the jury will find for the plaintiff accordingly."

"2d. That although the jury may believe from the evidence that the said defendant declared at the time the said reward was offered, that he was the agent of Mr. Meredith, the father of the deceased, and that as such agent he was authorised to offer a reward, or take any other steps necessary to arrest said Harper, yet the jury must not, from the said declarations of said defendant alone, unsupported by other evidence of the fact, find that said Hovey was the agent of said Meredith, and unless they believe from other evidence than the said declaration of said Hovey, that he offered the reward as such agent, they must find for the plaintiff."

Defendant objected to these instructions. The court below gave them to the jury, and defendant excepted.

Defendant then asked the following instructions:

"1st. That if the jury believe from the evidence that defendant promised to plaintiff, if plaintiff, would offer \$500 for the arrest and delivery of Harper, at the jail of Jackson county, Missouri, and plaintiff should afterwards become liable to pay such sum in consequence of such offer, he, the defendant would pay to plaintiff \$200 of that sum. Yet if they believe from the evidence that plaintiff paid the said sum, or any part of said sum for the apprehension and delivery of said Harper, at any other place than the jail of said county, they must find for the defendant.

"2d. That if they believe from the evidence that Hovey contracted with Pitcher as the agent of Meredith, and disclosed his principal at the time of making his contract, they must find for the defendant.

"3d. That proof of the payment to Prior does not support the allegation of payment to Duval.

"4th. That proof of payment of \$400 to Prior, does not support the allegation of payment to Duval and Prior.

"5th. That if the jury believe from the evidence that defendant agreed to pay \$200 of the reward offered by plaintiff for the apprehension and delivery of Harper at the jail of Jackson county, and that Duval and Prior, having apprehended said Harper, were by said plaintiff released and discharged from delivering said Harper at the Jackson county jail, in consid-

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eration of a different sum than the one offered, whether more or less than that sum, then and in such case Hovey is not liable, unless he consented to the alteration thus made by said Pitcher, Duval and Prior.

6th. "That if the jury believe from the evidence that plaintiff paid money for the apprehension and delivery of J. H. Harper, before he was delivered at the jail of Jackson county, then he paid the same of his own wrong, and cannot recover of the defendant therefor, unless they also believe from the evidence that the defendant instructed him so to do, or consented thereto.

7th. "That if they believe from the evidence that the plaintiff at the time of offering the reward, knew nothing of the alleged promise of defendant they will find for the defendant.

8th. "That, though they should believe from the evidence that defendant made the promise to pay \$200 of the reward in case plaintiff became liable to pay the \$500, so offered as a reward, yet, if they believe from the evidence that the plaintiff has paid no money by reason of offering the reward, except the \$400, which is stated he paid at Springfield, before Harper was delivered at the Jail of Jackson county, they must find for the defendant.

9th. "That unless they believe from the evidence that defendant requested plaintiff to pay for him, his, defendants alleged portion of the reward, at Springfield, before Harper should be delivered at the jail of Jackson county, they must find for the defendant generally.

10th. "That if they believe from the evidence that defendant's alleged promise, was to pay so much of the reward to the person who should apprehend and deliver Harper at the jail of Jackson county, and not to plaintiff, they will find for the defendant.

11th. "That there is no evidence before the jury that defendant requested plaintiff to pay any money for him at Springfield, or before Harper should be delivered at the jail of Jackson county."

The court below refused to give the 1st, 4th, 5th, 6th, 8th, 9th, 10th and 11th instructions asked by defendant, and he excepted.

There was a verdict for the plaintiff for \$160, and defendant moved to set it aside and to grant him a new trial, because the jury found contrary to the law and the evidence, and without sufficient evidence, and for the cause saved in the bill of exceptions.

This motion was overruled by the court below, and defendant excepted.

There was a judgment upon the finding, and defendant moved in arrest, because of the insufficiency of the declaration, and because the court refused to strike out the special counts. This motion was also overruled by the court below, and defendant excepted, and this cause is brought here by appeal.

### Hovey for appellant.

1st. That the special counts in the declaration do not charge that defendant promised. See Chitty's Pleading, vol. 1, page 309; 6 Mo. Rep. Muldrow vs. Tappan, p. 276.

2nd. That the court erred in giving the instructions asked by the plaintiff, in this:

*First*, That the first instruction proceeds as if the evidence was of a reward for the apprehension alone, when the evidence is of a reward for the apprehension and delivery, &c. 3 Mo. Reports, 286.

*Second*, That it assumes the fact that Thomson was sheriff, and there is no evidence of the fact. 4 Mo. Rep. 106.

*Third*, That it assumes the fact that Thomson was clothed with authority to take Harper from Prior at Springfield, when that fact should have been left for the jury to find. 8 Mo. Rep., 224.

*Fourth*. That the doctrine inculcated by the first instruction, is not the law arising upon the facts in this case.

See Chitty on Contracts, page 499 and 529; U. S. Cond. Reports, vol. 5, page 727; Starkie 2, page 46 and following; Smith's leading cases, note O. P. 70 a 2.

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*Fifth*, The second instruction takes the whole matter of contract from the jury, and precludes them from considering to whom the credit was given in the original contract. Mo. Rep. 6, 64 and 37.

3rd. That the court below ought to have given to the jury the instructions asked by defendant, which were not given.

*First*, That they ought to have given the 1st, 5th, 6th and 8th instructions asked by defendant. See authorities cited against 1st instructions given for plaintiff.

*Second*, That they ought to have given the 4th instruction asked by defendant. See Starkie 2, page 46 and cases there cited in note.

*Third*, That they ought to have given the 9th instructions asked by defendant, because none of the special counts are supported by the testimony, and the plaintiff could not recover on the common count without proof of a request, unconnected with the speciality. See record. See also Starkie on Evidence, vol. 2, page 53.

*Fourth*, That they ought to have given the 10th instructions asked by defendant. See the evidence, and also see Starkie 2, page 46 and case there cited in the note.

*Fifth*, That they ought to have given the 11th instruction asked by defendant. See the testimony, and also 11 Mo. Rep. 115, Lee et al. vs. David.

4th. The evidence does not support any of the special counts in the declaration.

*First*, The first count alleges payment to Duval. The proof is payment to Prior.

*Second*, The second count alleges payment to Duval and Prior. The proof is payment to Prior. It alleges that Thomson was sheriff. There is no proof of that fact. It alleges that Thomson took Harper, by virtue of a bench warrant, out of the custody of Prior and Duval. Parol evidence is incompetent to prove a record, and the proof is, that Thomson did not take Harper out of their custody by law or trespass.

*Third*, The third and fourth counts allege the offering of the reward for the "apprehension" alone. The proof is of a reward for the apprehension and *delivery*. Also the same variance attaches as to the second count.

5th. The plaintiff could not recover upon his common count for money paid to defendant's use. See Starkie on Evidence, vol. 2, page 55 a 6; Robertson vs. Lynch, 18 Johnson's Reports, 456; Spratt vs. McKinneys, 1 Bibb's Reports, 595; 8 Mo. Rep. 517.

6th. That the plaintiff was not liable to pay the \$400 by reason of offering the reward, and cannot recover of the defendant for any part of said term.

7th. That the jury ought to have found for the defendant.

## HAYDEN AND ENGLISH for appellee.

1. The court did not err in overruling the motion to strike out the four special counts.

The defendant moved the court to strike out these counts, upon the ground that they were substantially defective. If they were defective, he could only avail himself of the defect by demurrer or motion in arrest of judgment. Bury vs. St. Louis, 12 Mo. Rep. 298; Mullen vs. Pryor, 12 Mo. Rep. 307. But the record shows that the defendant did demur to the plaintiff's declaration, and being unwilling to abide by the judgment on the demurrer, withdrew it and filed the general issue; thereby abandoning the alleged defects in the declaration. Besides, counts will only be stricken out when they appear on the face of the declaration to be superfluous, not defective. 1. Tidd Pr. 667, and the motion is one directed to the discretion of the court.

2. The court did not err in overruling the motion in arrest of judgment. The grounds of the motion in arrest were, first, that the declaration was defective, and second, that the court overruled his motion to strike out the counts. This last was no ground, under any circum-



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stances, for arresting a judgment; and as to the ground that the declaration was defective, the court did not err.

*First*, Because the defendant having demurred to the declaration, and being unwilling to abide by a judgment on the demurrer, withdrew it and filed the general issue. He thereby abandoned any defects in the declaration, and could not subsequently avail himself thereof by motion in arrest of judgment.

*Second*, Because the declaration containing five counts, four special and one common count, and the common count being good, and entire damages being given, the good common count will sustain the verdict and judgment thereon. Rev. Code '45, p. 831, sec 7.

3. The court did not err in overruling the motion for a new trial.

The reasons assigned for a new trial, are,

1st. That the court wrongfully permitted the plaintiff to introduce parol evidence of facts, which should have been proved by the record.

2nd. Because the court overruled the motion to strike out the special counts.

3rd. Because the verdict is against evidence and the weight of evidence.

4th. Because the verdict is against law.

5th. Because the court gave plaintiff's instructions.

6th. Because the court refused defendant's instructions.

*First*, As no exception appears by the bill of exceptions to have been saved to the introduction of testimony, there is nothing in the first reason assigned for a new trial.

*Second*, The second reason, enumerated above, could, under no circumstances, be a ground for a new trial.

*Third*, The defendant assigns as a reason, that the verdict is against the evidence and the weight of evidence.

The bill of exceptions shows that there is ample evidence to sustain the verdict. The testimony of Mr. John Heard establishes the contract between Hovey and Pitcher, as alleged in the declaration. He also proves the publication of the notice of the reward offered. Mr. Thomson proves the receipt of Harper from those who had arrested him, and the payment of the money by Pitcher to those who had arrested him. There was some little evidence offered to try to impeach the testimony of Mr. Heard, but it was not of such a character as to have any weight with the jury; and this court will not say that the jury found a verdict against the evidence, when the court that tried the cause had refused to disturb it; unless that verdict is clearly against the evidence. *Oldham vs. Henderson*, 4 Mo. R. 301; *Vaughn vs. Montgomery*, 5 do. 532; *Mullikin vs. Greer*, 5 do. 493; *Lackey vs. Lam et al.* 7 do. 221.

*Fourth*, That the verdict is against law.

This objection is considered when we review the 5th and 6th objections.

*Fifth*, That the court erred in giving the plaintiff's instruction.

1st. The court did not err in giving the plaintiff's first instruction.

The objections which the defendant takes to this instruction. "that it proceeds as if the evidence was of a reward alone, that it assumes the fact that Thomson was sheriff," and "that it assumes the fact that Thomson had authority to take Harper," are not founded in fact, as may be seen by looking at the instruction itself and the evidence in the bill of exceptions.

The appellant considers himself in the light of a surety, which he is not, and the authorities he has read are inapplicable to the case.

He is an original promisor; the liability incurred is the consideration; Pitcher the contractor. In consequence of the reward offered, Pitcher became liable and paid \$400; and the appellant has no right to claim exemption because Pitcher did not pay all that he might, under the reward offered, have been compelled to pay. If he sustained damage in consequence of Hovey's promise, Hovey is responsible for that damage.

2nd. The court did not err in giving the plaintiff's second instruction.

If this instruction be wrong, it did not injure the defendant, for there is no testimony in the case from which the jury could have believed that the defendant made the promise, for Mr.

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Meredith, as his agent; and we do not see why the instruction was asked. (Finney et al. vs. Allen, 7 Mo. Rep. 419.) The appellant did not promise to pay the money in behalf of Mr. Meredith as his agent. He promised to pay it himself. Mr. Hockensmith does not say that Pitcher said that Heard says that you promised that Mr. Meredith would pay; but that Heard says that you promised that you would pay.

*S.xth.* That the court erred in refusing to give defendants instructions.

1st, The court did not err in refusing to give the first instruction asked for by defendant.

A contract is to be construed according to the object and intent of the parties; (Ch. on Con. 74.) The object was to recover the person of Harper for the purpose of justice; that object was accomplished.

2nd, The court did not err in refusing to give the fourth instruction asked for by defendant: Because Duval and Prior are proved to have had Harper in charge, and though Prior may have been the instrument in receiving and counting the money, yet they being together, the payment of the money to one is the payment of the money to two; as the payment of the money to one partner is the payment of the money to the firm.

3d, The court did not err in refusing to give the fifth instruction asked for by defendant.

4th, The court did not err in refusing to give the sixth instruction asked for by defendant.

5th, The court did not err in refusing to give the eighth instruction asked for by defendant.

6th, The court did not err in refusing to give the ninth instruction asked for by defendant: Because no request was necessary from Hovey to Pitcher, before Pitcher could be compelled to pay the reward offered, and the instruction was inapplicable to the first four counts.

7th, The court did not err in refusing to give the instruction asked for by defendant; because the presumption is that the money is to be paid to him from whom the consideration moves. Ch. Cont. 76.

8th, The court did not err in refusing to give the eleventh instruction asked for by defendant.

NAPTON, J., delivered the opinion of the court.

The principal and most important objection to the judgment in this case arises from the instructions which the court gave on the subject of agency. The defendant introduced proof to show that he made no contract with Pitcher, in relation to the reward offered by the latter for the apprehension and delivery of Harper, and also some evidence to show that, if he made any, it was in the character of an agent for Meredith. The circuit court gave two instructions on this subject, one at the instance of plaintiff, and the other asked by the defendant. The latter was correct, the former not.

It does not follow, because a person discloses himself to be an agent, and gives the name of his principal, that he is therefore not personally liable. The person with whom he is dealing may be unwilling to trust the principal, and yet willing to contract with the agent, upon his personal responsibility; and it then becomes a question of fact, to be determined by the circumstances of the case, whether the credit was given

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to the agent or not. The conversation and acts of the parties, at the time of the contract, must necessarily be evidence, indeed, in the absence of any written agreement, the only evidence of what the contract was. These are the *res gestae*—the contract itself. The admission of such testimony does not impair to the slightest extent, that well settled rule that a party cannot make evidence for himself; that his declarations in his own favor are not admissible. This rule is understood to be confined to declarations and acts *ex parte facto*, if I may be allowed the phrase—made in the absence of the party contracted with and after the transaction has passed away.

The second instruction given at the plaintiff's instance is certainly obscure; but if I understand it aright, it is calculated to mislead. The premises laid down in the first branch of the instruction are followed by a conclusion, which seems to have no bearing upon the case, and so far might be regarded as harmless, but a second sequence is drawn from them in the concluding paragraph, which not only makes the meaning of the entire instructions very obscure, but is in itself erroneous. Had the jury been told that the defendant's declarations that he was agent, and was authorized to offer a reward, were not sufficient of themselves to authorize a verdict in his favor, no objection could have been made to the proposition. For these facts may have existed, and yet the plaintiff may not have thought proper to give Meredith credit, and may have preferred contracting with the defendant. There was evidence to warrant this hypothesis and counter evidence which the jury were to determine. But the instruction proceeds to direct the jury that from such declarations alone, unsupported by other evidence, they must not find Hovey an agent. It was immaterial whether Hovey was agent or not; that is, whether he was an authorized agent or not. The controversy was not between him and his supposed principal, but between him and a third party, claiming to have contracted with him upon his individual responsibility, and the material question was, did the parties so contract or was the contract made with Hovey as the agent of Meredith? The instruction concludes with a distinct and independent proposition: "and unless the jury believe from other evidence than the said declarations of Hovey that he offered the reward as such agent, they must find for plaintiff." This last clause was certainly calculated to mislead. Hovey's declarations to Pitcher or Pitcher's agent, Heard, were undoubtedly evidence of the understanding between them, as well as what was said by Pitcher or Heard. To enable the jury to ascertain the intent of both parties, it was proper for them to know all that passed between them at

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the time of the supposed contract. Declarations made by Hovey at other times and to other persons would of course be inadmissible.

A good deal was said in the argument of this case in relation to the first instruction given by the court for the plaintiff. The defendant insists that his liability under the contract with plaintiff, admitting its existence and that he made it on his own responsibility, depended upon the payment of a reward for the apprehension and delivery of Harper, to the jail of Jackson county, and inasmuch as the plaintiff thought proper to receive Harper, from those who apprehended him, at Springfield in Green county, and to pay them four hundred dollars for their services up to that point, the contingency upon which his liability depended had not occurred. We cannot regard this objection as well founded. In the construction of agreements, courts must look to the objects which the parties have in view, and a substantial compliance with the obligations assumed, is all that is required. The manifest and sole object of the defendant, in requesting the plaintiff to increase his proposed reward was to secure the person of Harper. That object was attained, Harper was apprehended, and delivered at Independence, the county seat of Jackson. If the complainant saw fit to receive Harper at Springfield, and thereby diminished by one hundred dollars, the amount of his liability, he might be regarded as assuming the risk of his delivery to the jail of Jackson upon himself. In this view of the contract, the plaintiff would be entitled to the entire sum which the defendant promised to pay upon that event, and the defendant would not have been responsible for any portion of it, had Harper made his escape from the custody of the plaintiff, or the sheriff. The construction, however, given by the court was more favorable to the defendant holding him liable only for his proportional part of the reward. This was all the plaintiff asked, and to this he was entitled, if the contract was made as charged and as the instruction given hypothetically assumes. These facts are for the jury, and we shall remand the case for the purpose of having them again submitted upon proper instructions.

The objection to the declaration may be remedied by amendment, and this renders useless any consideration of the question presented by the motion in arrest and the motion to strike out the special counts.

Judgment reversed and cause remanded.

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DUVALL vs. P. & S. ELLIS.

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## DUVALL vs. P. &amp; S. ELLIS.

1. Unless the objections made in the circuit court to the reading of depositions *specially point out the grounds* of objection, the Supreme court will not consider them.
2. In order to authenticate a record of a court of a sister State, under the act of Congress of May 26, 1790, it is indispensable that the judge should state in his certificate, that *the attestation of the clerk is in due form*.
3. Where a court of a sister State is not so constituted as to bring it within the act of Congress of 1790, providing for the mode of authenticating records, its proceedings may be authenticated in the common law mode.

## ERROR TO RANDOLPH CIRCUIT COURT.

## WILSON for plaintiff in error.

1. The circuit court should have permitted the record of the probate court of Hancock county, Illinois, to have been read in evidence the certificate being sufficient authentication according to the acts of Congress upon that subject.
2. The deposition of Dillon Duvall, should have been suppressed.

NAPTON, J., delivered the opinion of the court.

William Duvall sued Peter H. and Sarah G. Ellis on a note for \$398,-50, due Nov. 1. 1842. The suit was commenced in 1846 in the circuit court of Randolph county. Issues were taken upon the pleas of payment, set off, and the general issue. Upon the trial, the defendants attempted to show by means of the depositions, and a record of a Chancery suit in Kentucky, that they had paid off the note sued on or rather that they had paid up a certain indebtedness which existed on the part of plaintiff to one Martin Duval, equal in amount to the note sued on and this indebtedness grew out of the same transaction which gave rise to the note sued on. To the reading of one of the depositions, the plaintiff objected; but the objection was overruled.

The plaintiff in rebuttal then offered to read a record of the proceedings of the Probate court of Hancock county in the State of Illinois, to authenticate which there was appended the following certificate. "I, David Greenleaf, Probate Justice of the peace in and for said county of Hancock, and presiding Justice of said court, do hereby certify, that the foregoing is a full and true copy of the records in my office of the proceedings on the estate of Walton R. Hurst deceased, so far as the same appears from the books and papers in my office. In testimony whereof, I have hereunto set my hand and private seal (there being no public seal provided for said office, and I being my own clerk, no clerk



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being allowed by law to the Probate Justice) at my office in Carthage in said county of Hancock, this 16th day of March A. D. 1847.

DAVID GREENLEAF,

Probate Justice of the peace for Hancock Co. Ills."

And the following additional certificate.

"State of Illinois, Hancock county, set. I, George W. Thatcher, clerk of the county commissioner's court in and for said county, do hereby certify, that David Greenleaf, Esq., whose name appears to the foregoing certificate, was on the day of the date thereof an acting Probate Justice of the peace in and for said county, duly elected, commissioned and qualified, as appears to me of record, and that his official acts as such, are entitled to full faith and credit. In testimony whereof I have hereunto set my hand and affixed the seal of said court at Carthage, this 16th day of March, 1847. George W. Thatcher, cl'k. c. c. c. H. c."

This record was not permitted to be read. Thereupon the plaintiff took a non suit. To set this non suit aside is the purpose of this writ of error.

The objections to the deposition of Dillard Duval cannot be considered here for two reasons, first, because no exception was taken to its admission, and second, if there had been, the objection made here is merely partial, and does not apply to the whole deposition, and therefore was no ground for its entire exclusion. In such cases, the specific parts objected to should be pointed out in the circuit court, and at the proper time. There is nothing in the bill of exceptions to show that this was done—nothing to show what the objections were, whether to the authentication of the deposition, the competency of the deponent, or the competency of only portions of his depositions. The latter is the objection insisted on in this court, but there is nothing in the record to show that this objection was made in the circuit court.

The ruling of the court which occasioned the non suit was the exclusion of the Illinois record. It is urged now, that this record was sufficiently authenticated under the act of Congress of May 26, 1790.

It is very questionable, whether a court constituted as this Probate court of Hancock county was, is one whose proceedings can be authenticated in the mode pointed out by that act. I observe that Judge Cowan in his notes on Phillips (vol. 3 p. 1125) states that in New Hampshire, Massachusetts, New York, Ohio, and perhaps some other states it has been held, that the proceedings of justices of the peace cannot be authenticated excepted in the common law mode, or in such

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other modes as the statutes of each State may have provided. In Connecticut, Vermont and Kentucky, we are informed by the same writer, a different opinion prevails. It is unnecessary to determine the question in this case; for admitting that a proper authentication could be made by such a court as the Probate Justice of the peace for Hancock county, under the act of Congress, it is manifest that a material requisite of that act has not been complied with. It is not certified by the Justice, that his attestation as clerk *is in due form*. That this is indispensable appears from a variety of cases cited in the work already alluded to. Cowan and Hill's notes p. 1133.

Whether this court was so constituted as to bring it within the act of Congress of 1790 or not, there is no doubt its proceedings might have been authenticated in the common law mode. It appears that in Ohio (Silver Lake Bank vs Harding, 5 Hamm, R. 546) that the certificate of the clerk of the county court, under the seal of that court has been regarded as sufficient proof that the person certifying the transcript is a justice and authorised to make such certificate. Upon what principle this opinion was based I cannot learn from the report of the case by Judge Cowan (notes p. 1128) and I have not access to the Ohio Reports. It may be that a statute of that State authorised such a mode of authentication. We have no such statute here, and I know of no principle of the common law which warrants this court in taking official notice of the seal of a county commissioners court of a county in Illinois, although a certificate of the same fact under the great seal of the State might be sufficient.

Judgment affirmed.

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HIGGINS, ADM'r OF HIGGINS vs. RANSBALL.

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1. County courts are expressly authorized to hold as many adjourned terms as they deem necessary, and at any time, provided the period fixed for the adjourned session does not overrun the next regular term; and all business done at such adjourned sessions, is considered as done at one and the same term.

HIGGINS, Adm'r. of HIGGINS vs. RANDALL.

## ERROR TO PETTIS CIRCUIT COURT.

## STATEMENT OF THE CASE.

The facts in this case, as they appear from the record, are that the defendant in error caused a notice to be served on the plaintiff in error, that he, Randall, would present to the county court of Pettis county, on the 1st Monday in December, 1848, for allowance against the estate of Abraham Higgins, deceased, a note and an account, setting out a copy of the note and account in the notice. On the 1st Monday in December, upon the notice being filed in the county court, the court continued the cause as to the note until the 1st Monday in February then next ensuing, and proceeded to try and determine the cause as to the account, and allowed the same against the estate. At the regular term of the county court, on the 1st Monday in February, 1849, it being the 5th day of February, the court proceeded to try and determine the cause as to the note, and allowed it against the estate; and on that day adjourned until the next day, the 6th day of February; and on the 6th of February, the court adjourned until the 1st Monday in March; on the first Monday in March, the court adjourned until the first Monday in April, and on the first Monday in April, the plaintiff in error filed an affidavit for an appeal, which was granted him, and the cause sent up to the Pettis circuit court. At the April term of the Pettis circuit court, the defendant in error appeared, and the cause was continued generally until the October term, and at the October term, the defendant in error filed two motions, one to dismiss the appeal as to the account, the other to dismiss the appeal as to the note. These motions were both sustained by the court, and the appeal was dismissed. To this opinion of the court, in sustaining these two motions, the plaintiff in error excepted, and filed his bill of exceptions. The case is brought to this court by writ of error.

## ENGLISH for plaintiff in error.

1. The within notice required (Rev. Code of 1845, p. 93, sec. 12,) to be served upon an administrator, that a claim will be presented for allowance at the next term of the county court, stands in the place of a summons; its object being to bring the administrator into court, and its service is the commencement of a suit against the administrator in the county court. This notice must not be confounded with that provided for in sect. 5, page 91, of Rev. Code '45.

There are at least four other instances in which a notice is required to be served by our statute, and in which the notice stands unquestionably in the place of a summons, and its service is the commencement of a suit.

These are: 1st. Notice of application to county court for specific execution of a contract for the conveyance of real estate, Rev. Code of '45, p. 88, sec. 38.

2nd. Notice of application for assignment of dower in slave. Rev. Code of '45, p. 433, sec. 18.

3rd. Notice of application for distribution of slaves. Rev. Code of '45, p. 100, sec. 5.

4th. Notice of application for partition of land. Rev. Code of '45, p. 766, sec. 5.

This is expressly called a *suit* for partition in the act of January 25, 1847, (session acts, page 106,) and by this last act a party is permitted to institute the suit by summons.

2. That this notice, as it must also contain (Rev. Code of '45, page 93, sec. 12,) a copy of the instrument of writing or account on which the claim is founded, and its object being to apprise the administrator of the nature of the claim to be presented, stands also in the place of a declaration. In this respect it is analogous to a writ of scire facias which stands as a declaration. *Garner vs. Hays*, 3 mo. R. 436.

3. As the written notice served on the administrator stands in the place of both a summons and a declaration, no matter how many different causes of action are set forth in the notice,

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they all constitute but one suit. The different causes of action may be considered so many several counts, as in the case of a petition in debt. *Jones vs. Cox et. al.*, 7 mo. R. 173.

4. The notice, served in this case, standing in the place of both a summons and a declaration, was then the commencement of a suit, and the note and account set forth in the notice constituted but one suit, it being but one suit for two different causes of action.

5. As there was but one suit, although the county court decided as to the account at the December session of the court, the defendant in that court could not take an appeal, at that time, from the judgment of the court upon the account, as the whole suit was not disposed of, but the suit was still pending in that court. *George vs. Craig*, 6 Mo. R. 648. *State vs. Pepper et. al.* 7 Mo. R. 348.

6. The county court having disposed of the account, at the December session, and of the note at the ensuing February term, the suit was not disposed of so that the defendant could appeal, until the February term of the court.

7. The county court possesses the power of adjourning from time to time; of adjourning to the following day, or to a subsequent day, to the next week or to the ensuing month, in continuation of the regular term, (Rev. Code '45, page 336, sec. 47,) and the only limit to their power of adjournment is, that the adjourned session shall not interfere with a subsequent regular term of the court. Rev. Code of '45, page 337, sec. 54.

8. The regular term of the county court having commenced on the first Monday in February and the court having on that day adjourned to the succeeding day, and on that day adjourned to the first Monday in March, and on that day adjourned to the first Monday in April; these successive adjournments were but continuations of the February term of the court.

9. The successive adjournments being but continuations of the February term of the court, the appeal taken on the first Monday in April was well taken, and carried up the whole suit to the circuit court for a trial *de novo*. Rev. Code of '45, p. 106, sec. 2.

10. The trial of the suit as to the account, at the December court, whilst they continued the suit as to the note to the February term, was an error of the county court.

11. Upon the filing of the papers and transcript in the circuit court, that court was possessed of the cause, and should have proceeded to hear, try and determine the whole cause embraced in the notice anew, without regard to any error, defect or other imperfection in the proceedings of the county court. Rev. Code '45, p. 107, sec. 7.

12. The rights of the plaintiff in error are not to be prejudiced in the circuit court, by the error of the county court in deciding part of the suit at the December court, and the other part at the ensuing February term, *Ser vs. Bobst*, 8 Mo. Rep. 506.

13. Even if the court should hold that there are two suits in the transcript, one upon the account and the other upon the note, and that the appeal taken was not well taken as to the judgment upon the account, yet as the judgment upon the note was rendered at the February term, and the appeal was taken during the continuation of that term; the appeal was taken *prima facie* from the judgment upon the note, and as to that judgment, it was undoubtedly well taken.

14. But, even if the court should believe that the appeal was improperly taken, yet as the defendant in error appeared at the April term of the circuit court, and the cause was continued generally to the October term, the defendant in error thereby admitted that the circuit court had jurisdiction of the cause, and waived any irregularity in taking the appeal; and, having so waived it, could not subsequently avail himself of the irregularity by motion to dismiss the appeal. *Cupples et al vs. Hood et al*, 1 Mo. R. 497; *Beths vs. Logan*, 2 do 2; *Hembree vs. Campbell*, 8 do 572.

NAPTON, J., delivered the opinion of the court.

The only question in this case arises upon the construction of a sec-

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tion in the last article of our law of administration which requires all appeals from the county court to be taken "during the term at which the decision complained of is made."

Ransdall obtained a judgment against the appellant upon a note at the February term, 1849, of the county court of Pettis county, and after the judgment was rendered, the court adjourned to the first Monday in March and after meeting on the 5th of March, (which was the first Monday of that month) adjourned again until the first Monday of April, at which last mentioned time an appeal was asked and granted from the judgment rendered in February.

The county courts are by law required to hold four terms each year, and these terms are fixed by law in the months of February, May, August and November. The county courts have the power given them by the statute to alter the times of holding these terms, but it would seem from the record, that no change in this respect has been made in Pettis county.

These courts are also expressly authorized to hold adjourned terms at any time. This power would have been incident to the court without any such special authority. A *special* term is also authorized and the distinction between a special and an adjourned term is sufficiently obvious—the former being called for special purposes and upon the order of one or two of the justices in vacation.

When the county court of Pettis county adjourned sometime in February until the 5th of March, and again upon the last named day, adjourned to some time in April, these successive meetings were but continuations of the February term of the court. When the court was in session in April, the justices were still holding the February term. It was certainly not the April term, as no such term was known to the law and no special term at that time had been called. The court had the power to adjourn for a day, a week, or four weeks, or indeed any length of time, provided the period fixed for the adjourned session did not overrun the next regular term. A term of a court does not imply a session of such court during each consecutive day or week. A hiatus of a week or a month does not divide the term, if it be produced by adjournments. It follows, that as the statute authorized an appeal during the term at which the decision is made, this appeal from a judgment rendered in February, was well taken, at the adjourned session, in the following April.

We do not concur with the views of the plaintiff in error upon the effect of this appeal as to the account. A judgment upon the account



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had been rendered at the November term, 1848, and no appeal was taken from that judgment. The style or form of the notice does not affect the case. The county court, evidently treated the actions or claims as distinct, and gave a judgment accordingly. They might perhaps have acted otherwise; but they had the power to act as they did, and no objections were made to their course of proceeding. The judgment upon the account was acquiesced in, and has no connexion with the judgment from which an appeal was taken.

The judgment of the circuit court is reversed and the cause remanded.

## HENLEY vs. ARBUCKLE, GUARDIAN OF MOBBERLY.

1. Where a verdict of a jury is substantially defective in omitting to find a material issue, the circuit court cannot supply the defect; but where a verdict is merely informal, the court may put it in proper form.
2. A substantial omission in the verdict of a jury, may be supplied by the court, with their consent, so as to make it conform to their intention.

## APPEAL FROM HENRY CIRCUIT COURT.

## STATEMENT OF THE CASE.

This was an action of detinue, for six slaves, to which the defendant pleaded the former statute general issue, applicable to all actions; upon which there was a jury trial. The record contains a formal verdict and judgment for the plaintiff. From a bill of exceptions in the cause it appears, the jury returned a verdict in which they state that they find "the slaves, (specifying them) to be the property of the plaintiff, as mentioned in the declaration," and assess the value of each slave separately, and find nothing more. Before the jury were discharged the court enquired of them, whether they were willing the court should put their verdict into form, to which they assented, and were discharged before the attestation was made, and to which there was no objection. Afterwards the defendant moved for a new trial, because (among other reasons not applicable to this ground of objection) the jury returned no verdict upon which a judgment could be rendered. There was also a motion in arrest of judgment on account of defects in the original finding of the jury. These motions were overruled and final judgment was given in favor of the plaintiff, from which the defendant appealed to this court.

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**WINSTON, for appellant.**

The point which I will urge to the court is, that the finding of the jury is not such an one as authorized the court to give judgment against the defendant. The jury did nothing more than find that the slaves sued for were the property of the plaintiff, and assess the value of them, without any specific finding against the defendant, and without any finding that the same ever had been in the possession of the defendant, or that he had detained them from the plaintiff.

The issue joined was not whether the slaves were the property of the plaintiff, but whether or not the defendant unlawfully detained the slaves of the plaintiff, and the finding of the jury was only of a part of the issue, and the court could not properly render a judgment against the defendant, unless the jury had found the entire issue against him. From all that appears from the finding, though the slaves belonged to the plaintiff, yet the defendant might never have been in the possession of them, and never have detained them from the plaintiff, and the court could not have presumed this in favor of the verdict, for the jury did not say in their verdict that they found for the plaintiff, or that they found against the defendant, but simply found the slaves sued for to be the property of the plaintiff and assessed the separate value of each, and this was all they did find.

I will cite the court to the following authorities. 5 Mo. Rep. 52, 3; 4 Mo. Rep. 446; 6 Mo. Rep. 52; 3 Mo. Rep. 390; 1 Mo. Rep. 183, 283, 300-1; 3 Mo. Rep. 275.

All these cases establish the doctrine that a verdict must find all the issues, or the judgment will be arrested.

**LEONARD & BALLOU, for appellees.**

1. A verdict may be amended in the circuit court, from the minutes, or even from the memory of the judge, and so this amendment may have been made upon sufficient grounds. Logan vs. Ebdon, 1 Burr. Rep. 383; Newcomb vs. Green, 2 Strange, 1197; Mayo vs. Archer, 1 Strange, 514; Petrie vs. Hannay, 3 Term Rep. 659; Clark vs. Lamb, 8 Pick. Rep. 416.

2. Whether it was or was not made on sufficient grounds, does not appear in the record. The application to amend, and the grounds upon which the amendment was made, are not preserved in the bill of exceptions, and the presumption therefore stands that it was rightly made.

3. If it did appear, and the grounds so appearing were insufficient to warrant the amendment, yet, no exception is taken to the allowance of the amendments, and therefore the objection cannot now be made here. Shelton vs. Ford & Whiteside, 7 Mo. Rep. 211; Cox vs. Kitchen, 1 Bos & Pull, 339; Vauxl. vs. Campbell, 8 Mo. Rep. 227.

4. If all this were otherwise, the finding and what passed in the court before the jury were discharged, authorised the court to make the amendment.

**NAPTON, J., delivered the opinion of the court.**

We cannot see any substantial objection to the course pursued by the circuit court. The verdict as it appears on the record is formal. A bill of exceptions is filed with a view to show that this verdict was never rendered by the jury. This bill states two facts, first, that an informal, perhaps an incomplete verdict was rendered by the jury; the verdict being, that the plaintiff was the owner of the slaves in controversy, without further stating that the defendant detained them. It also appears,

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in the same way, that the court advised the jury that their verdict was not in due form, and enquired of them if they were willing that it should be put in proper form, to which an affirmative response was made.

It is not pretended that the court may not exercise this power in a suitable case. But the objection is, that the verdict was not merely informal, but substantially defective in omitting to find a material issue, and that this defect could not be supplied by the court. If this objection existed in point of fact, it would certainly be a good one. It will not be claimed, that the courts can substitute their findings for those of the juries. But we understand the verdict of the jury, as reported in the bill of exceptions, to be merely a general verdict for the plaintiff. We suppose the circuit court so understood it, and that the jury so understood it. If the construction were doubtful, that court heard the testimony, and knew the real matter of controversy and was better enabled to interpret the finding of the jury than we could be. Doubtless in this as in other actions of detinue, the only controversy which the jury understood to exist was, as to the right of property. There was probably no dispute about the detention by the defendant.

But again, the objection is purely technical, and may well be encountered in the same spirit. It does not appear, but that the court fully explained to the jury the omission in their verdict, and that their consent was given to supply it. The bill of exceptions does not exclude such an inference.

Judgment affirmed.

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A, by his will devised to his son B, and to his daughter C, in equal moities a tract of land, with the provision that "if his said daughter should marry or die," the land should belong exclusively to his said son. Held, that the above condition attached to the estate of the daughter, is in restraint of marriage, and is void.

## ERROR TO BOONE CIRCUIT COURT.

**GORDON for plaintiffs in error.**

The plaintiff in error insists that the court below, improperly sustained the demurrer to the petition for the following reasons.

1. By the will of Joseph Cowden, his daughter, Louisa, acquired at his death an absolute title in fee simple to one half of the tract of land mentioned in the petition, of which she was not divested by her subsequent marriage. The condition in the will, that "if she married, the land should belong to his son, Montgomery Cowden," was in general restraint of marriage, and therefore illegal and void. 10 East. R. 22; 1 Story's Equity, pages 271, 273, 279, 280, 281, 282, 283 and 284; Foubt. Equity B. 1 Ch. 4, sec. 10 and note thereto; 3 Vesey Rep, side paging 96; Story on Contracts, page 124, sec. 195, 196.

2. The devise to Louisa Cowden passed to her at the death of the testator, a perfect title in fee simple to one half of the land which was not divested by her subsequent marriage, although the land was given over to Montgomery Cowden by the will, because the condition annexed to the devise was a condition subsequent and annexed to a devise of real estate, and in general restraint of marriage, and therefore against the policy of the law and void. 2 Powell on Devise, side page 291; 1 Story's Equity pages 285, 286; Story on Contracts, page 125, section 197. Co. Litt. 206, note K. As to conditions see Cok. Litt. 201 note A.

**ROBARDS for defendant in error.**

1. The devise in the will to Louisa, the daughter of the testator is good in law, there being in express devise of the same property over to appellee upon her marriage. 3 Vesey Chan. Rep. 95; 3 Atk. 367; Willes Rep. 93-4-6; Mass. Rep. 178-9; 11 Mo. Rep. 131; 1 Dana 230; 2 Ben. Monroe 314; Williams on Ex. 913; 1 Brown C. Rep. 273; 19 Vesey 13; 1 Atk. 378, 380, and note 1; 2 Atk. 590; 1 Story's Equity 286-7.

2. The devise to Mrs. Williams does not vest a title in her to the land which is to be forfeited by her marriage; but is a limitation of the estate expressive of its duration. By the terms of the will, Montgomery Cowden, upon the death of his father, takes a vested interest in the land subject to a partial enjoyment of it by Louisa, his sister, during her life, or until she should marry.

3. The rule of law contended for, "that a devise in restraint of marriage is void," is a mere rule of construction not applicable in our courts. 3 Ves. 96; Willes 93.

4. The evident intention of the testator in this will is, to give to his son Montgomery, in the event of his marriage, the absolute estate in the land. His marriage is admitted. This is a good devise. He acquired a vested interest in the land upon the death of his father, to be enjoyed after the determination of a particular estate carved out of it. This limitation being good, cannot be made void by a construction of the will manifestly contrary to the express intention of the testator. It would be making a will for him, and not interpreting his own will.

5. In England the rule never was considered as applicable to devises of real estate and should be so decided here. 1 Atk. Rep. 380 and note 1; 2 do 590.

**Judge BIRCH delivered the opinion of the court.**

The plaintiffs in error brought their suit in the Boone circuit court, against the defendant, for partition of a tract of land. The petition alleged that in the month of August, 1845, Joseph Cowden died seized

of the tract in fee, and that prior to his death he made and published his will, whereby, amongst other things, he gave and begueathed to his son Montgomery, and his daughter Louisa, in equal moities, the tract of land in suit, with provision, however, that if his said daughter should marry or die, the land should belong to his said son exclusively. It is further alleged in the petition, that at the commencement of this suit, the said Montgomery was living and married, and that on the 26th day of January, 1847, the plaintiffs intermarried with each other. The petition concludes with the allegation that the said Montgomery and the said Louisa are each entitled to the equal undivided half of the land, and prays for judgment of partition or sale accordingly. The circuit court having sustained the defendant's demurrer to the petition, the plaintiff presents the legal questions involved in that decision, for the examination and decision of this court.

The question being a new one in the jurisprudence of our State, and the authorities to which we have been referred apparently irreconcilable, we have bestowed upon it such analysis and reflection as has resulted in the conclusion, that upon all just principles of reason and analogy, the legal effect of the will in question, so far as it can be inferred from the pleadings before us, was to vest the real estate therein specified, at the death of the testator, in his two children, as tenants in common; and that the condition subsequent, respecting the marriage of his daughter, was not such an one as the law will divest such an estate. Viewing the case thus, neither the distinction which seems to be somewhat relied on, where there is and where there is *not* a "bequest over," nor the one even less applicable in this country, as between bequests of real and personal estate, need be further examined or remarked upon here, than to state in reference to the former, that in the absence of the will itself, (there being as yet neither answer nor testimony,) we must needs regard the alleged provision as within the *general* rule instead of such exception as may or may not be established upon the full hearing for which we shall remand the cause.

Upon the general proposition, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to *society*, to be weighed in the scale against individual or personal *will*. In this case, it need scarcely be more specifically intimated, that the clause in question, however well intended, virtually presented and held up a continued reward for that species of immorality to avert which the *institution of marriage* was so divinely ordained



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*and has been so wisely upheld.* By its terms, no offence but that of *marriage*, however suitable; no *crime* even, could divest his child of the estate bequeathed her; Surely society has not been organized thus to uphold a direction to *property*, which is not its *creature*, and which could not even be acquired or transmitted without its aid and protection, but which it must be obvious might thereby undermine and overthrow the main foundation upon which it reposes. It is admitted that this may be regarded, in one sense, as an isolated case, but to this it must be answered, that courts can pass upon it only as parcel of a system in contravention with the one out of which has grown the right to pass upon it at all.

Judge Story, in his admirable commentaries upon equity jurisprudence, after remarking upon the cases which even he cannot reconcile, states the general result of the modern English doctrine in these words: "Conditions, annexed to gifts, legacies and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy and the due economy and morality of domestic life, it will be held utterly void."

Mr. Fonblanque has also with great propriety remarked, that "the only restrictions which the law of England imposes, are such as are dictated by the soundest policy, and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that, professing to assert his *own* claim, he shall not disappoint or control the claims of *nature*, nor obstruct the interests of the community; that what purports to be an act of generosity, shall not be allowed to operate as a temptation to do that which militates against nature, morality or sound policy or to restrain from doing that which would serve and promote the essential interests of society—These are rules which cannot reasonably be reprobated, as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise."

Godolphin, likewise, has very correctly laid down the general principle, that "all conditions against the liberty of marriage are unlawful"—so that the marvel would seem to be that courts should have so differed in the application of such obvious principles, as to leave perhaps the preponderance of *that* description of authority in favor of the opinion which we have thus reversed.

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GORDON vs. GORDON.

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## GORDON vs. GORDON.

If the instructions given by the court be not objected to, at the time they are given, and the giving them be not assigned in the motion for a new trial, the supreme court will not consider them.

## ERROR TO POLK CIRCUIT COURT.

## BALLOU, ABELL and STRINGFELLOW, for appellants.

1. On the plea of not guilty, the plaintiff must in this case, where the words are not in themselves actionable, not only prove the words as laid, but that they were spoken with reference to testimony given by plaintiff, before the grand jury of Polk county, in the investigation of a matter cognizable by them; and that the testimony so given was material to the determination of the matter in question. 2 Johnson Rep. 10; 2 Johns. 344; 14 Wend. 120; 1 Wend. 475; 5 Mo. Rep. 21; 1 Chitty Pl. 400; 1 Dennis 208; Harris vs. Woods, 9 Mo. 113; 12 Wend. 500; 8 Mo. R. 512.

2. There was no evidence to show that the grand jury spoken of by the witness, was a grand jury for Polk county, nor that such grand jury was ever sworn; nor that the charge against Hendrickson was for an offence cognizable by the grand jury; nor that the testimony by plaintiff in error, referred to by defendant as false, was material to the investigation. On this latter point the evidence seems to show that allusion was made to testimony relative to what was said by defendant below, at the time of the fight, which was wholly immaterial in the investigation of the charge against Hendrickson. There was no evidence as to the nature of the charge against Hendrickson. See the authorities before cited.

## WINSTON for defendant in error,

By reference to the bill of exceptions, it will be seen that there is not only some evidence to support the verdict of the jury, but that the preponderance of the testimony is actually in favor of the plaintiff below. As to the verdict being against the instructions of the court, it is in accordance with the only instruction asked by the plaintiff below, and this instruction is not complained of by the plaintiff in error. 10 Mo. Rep. 516.

## Judge BIRCH delivered the opinion of the court.

This was, on the trial, an action on the case for words spoken; no testimony having been given upon the count for libel. The count for verbal slander charged the defendant with having said that the plaintiff had "sworn a lie," averring somewhat loosely in the colloquium and inuendo, that the charge was made and understood with reference to certain testimony given by the plaintiff "on points material" to a charge which had theretofore undergone investigation before the grand jury of Polk county, and was intended and understood to impute to the plaintiff the crime of perjury.

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The defendant having pleaded the general issue, and also a special justification, it was proven upon the issues thereupon joined, that the defendant had said of the plaintiff, that if he (plaintiff) had sworn what he (defendant) had heard he had, he (plaintiff) had sworn a lie; and upon being answered by the grand juror with whom he was conversing, that he (plaintiff) had sworn pretty much as he (defendant) had heard and just related, the defendant called the attention of others who were near by, and pronounced the charge *direct* that the plaintiff had "sworn to a lie." There was other testimony designed to show that the defendant was understood by others present as having made the charge hypothetically, or "conditionally" only, and this was the substance of all the evidence.

The court instructed the jury to the effect, that if, after taking into consideration every thing which was said by the defendant at the time of speaking the words, they believed they were spoken hypothetically, or were not designed to charge the plaintiff with perjury, they would find for the defendant; but that if they believed otherwise, and that they were spoken with reference to the testimony given by the plaintiff before the grand jury, touching a prosecution pending before that tribunal, they would find for the plaintiff. No objection was made to the instructions, as indeed none could have been reasonably entertained, at least on the part of the defendant.

The jury having found the issues for the plaintiff, and assessed damages accordingly, the defendant moved to set aside the verdict and award a new trial, upon the grounds that it was against the testimony, the instructions and the law; and for overruling that motion, the defendant has made himself plaintiff in error in this court.

No proper foundation having been laid during the trial below for the application of the authorities to which we have been referred, they need, not, of course, be considered or remarked upon.

We consider that the point heretofore passed upon by this court, has been well renewed by the counsel for the defendant in error, namely, that as the instructions upon which the case was committed to the jury, were not objected to at the time, and in the motion for a new trial, the verdict which was found upon them cannot now be disturbed. The legal reliances and objections of parties must of course be properly brought to the *consideration* and submitted to the *judgment* of the court below, before this court can have any proper *appellate* jurisdiction of them.

As to the verdict of the jury, it is of course not material whether

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they found the issue as we would have done, provided there was evidence (as there was) upon which they might find as they did. Whilst the constitution and the laws continue so justly to regard the concurrence of the jury box as a safer and more reliable abiter of the facts in issue than the bench can be, the case must be a strong one, indeed, in which this court would overturn, not merely the finding of such a tribunal, but the subsequent acquiescence of the Judge who tried the cause. Upon the whole case therefore, the judgment of the circuit court is affirmed

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<sup>14</sup>The term "*legond sea*" in the first section of the statute of "limitation" of 1825, means "*without the United States.*" (The cases of *Shreve vs. Whittlesey adm'r of Whittlesey*, 7 Mo. Repts., page 473, and *Bedford vs. Bradford*, 8 Mo. Repts., page 233, are overruled by this decision.)

## ERROR TO HENRY CIRCUIT COURT.

## STATEMENT OF THE CASE.

This was an act of assumpsit brought in the Henry circuit court in April, 1848, by Marvin as administrator of Bates against A. W. Bates upon three several promissory notes bearing date October 10th, 1828, payable, one on the first of January, 1831, the second first of January, 1833, and the third, first of January, 1834; for one hundred dollars each. Said notes were executed by the defendant, A. W. Bates to the plaintiff's intestate.

The defendant, at the return term of the writ, filed his plea of the general issue, under and conformable to the statute of 1847.

At the trial term by consent of parties the cause was submitted to the court for trial without a jury. The plaintiff read to the court the three several notes sued upon as evidence of his debt, and it was agreed by the parties and so submitted to the court, that at the time of the execution of the notes read in evidence, the defendant and plaintiff's intestate, the payee of the note both resided in the State of Kentucky. That the defendant removed to the State of Missouri in the fall of the year 1828 or 1829, and has continued to reside in this State ever since. That the intestate also resided in the State of Kentucky at the time the notes were executed, also at the time the cause of action accrued upon each note and continued to reside in the State of Kentucky up to the time of his death; and it was also further agreed that the said intestate, Dan'l. Bates, never had been in this State from the time the action accrued; and

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it was also admitted by defendant that the plaintiff in this suit was the administrator of Daniel Bates deceased.

The defendant introduced one B. F. Wallace as a witness, who testified that in the year 1835, he was at the house of the plaintiff's intestate in Kentucky, in his life and that Daniel Bates then said to him that the defendant owed him four hundred dollars, and that if the defendant would pay him one half, he would forgive the balance. That he did not know that he would push the defendant on the notes, yet, after his death, the notes might fall into the hands of his administrator, and that defendant might be troubled. Witness further stated that defendant started to Kentucky with his family in 1839. This was all the testimony in the cause.

The plaintiff thereupon asked the court to declare the law to be in this case: "That if the defendant executed said note in the State of Kentucky, and that the plaintiff's intestate resided in Kentucky at the times said notes fell due, and that the said defendant removed to this State before said notes became due, and has continued to reside in this State ever since, and the plaintiff's intestate, at the time the cause of action accrued on said notes was in and resided in the State of Kentucky and continued to reside in said State of Kentucky up to the time of his death, and never came to this State, and that said intestate died some three or four years since; that then, these facts are sufficient to take the case out of the statute of limitations, and that defendant cannot set up said statute as a defence or bar to this action." But the court refused to give this instruction, or so to declare the law to be, to which opinion the plaintiff excepted.

Thereupon the defendant asked the following instruction. "That if the notes sued upon have been due for ten years or more before the commencement of this suit, and the defendant has been during all of that time in the State of Missouri, and the plaintiff and intestate all the time knew of his residence, then the defendant is not liable in this action and is entitled to a verdict;" which instruction was given by the court and the plaintiff excepted.

The court thereupon found a verdict for the defendant. The plaintiff then filed his motion to set aside the verdict and grant him a new trial; which several motions being overruled by the court, the plaintiff excepted thereto and has brought the case to this court by writ of error.

### WALLACE, STUART and MILLER, for plaintiff in error.

The court erred in refusing the instruction asked by the plaintiff as well as in giving that asked by the defendant.

The evidence offered by the plaintiff shows an indebtedness to his intestate on the part of the defendant by three several promissory notes, due and payable in 1831, in 1833 and in 1834. That the debt was contracted in Kentucky, and that before the debt became due upon either note, the defendant removed to Missouri, the plaintiff's intestate continuing in Kentucky. The defendant relied upon the statute of limitations, of this State, barring actions of debt or assumpsit upon promissory notes after the lapse of time specified in the statute. The plaintiff contended before the circuit court, and so asked the court to declare the law, that if the defendant were all the time a resident of Missouri, and the plaintiff a resident of Kentucky, that then the plaintiff's case was brought within the provisions, and exception of the act in favor of persons beyond sea.

The instructions asked by the plaintiff and defendant, being up again for review, the proper construction of the terms "beyond sea," although the instruction asked and given for defendant go to a greater length.

The question now presented for the consideration of this court has been twice decided by this court. First, in the case of Shreve, Adm'r. of Whittlesey, vs. Whittlesey, in the 8th vol. Mo. Rep. page 473; and again in the case of Bedford vs. Bradford, contained in the 8th vol. Mo. Rep. page 233; in which latter case the supreme court adhere to the former decision, that the term beyond sea, in the first section of the statute of limitations of 1825, means out of the State. The counsel for plaintiff in error deem these cases as sufficient to determine the ques-



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tion. But should this court review those decisions, we would suggest the decisions of other courts as high authority to sustain the cases referred to. Angel, in his work on limitations, sustains the decisions of this court. See Angel on limitations, page 219.

Upon the statute of limitations of the State of Ohio, containing an exception in favor of persons "beyond sea," at the time the action accrues, the supreme court of that State have decided, that those persons without the jurisdiction of the State were "beyond sea," within the meaning of the act. See the case of C. Richardson's Adm'r. vs. Richardson's Adm'r. 6 vol. of Ohio Reports, p. 60; and in that case the court says the terms "beyond sea," are borrowed from the act 21 James I., which, in England, have been judged to have a meaning synonymous with beyond or out of the realm. They further say, like expressions have been held by the supreme court of the United States to be equivalent to "*without the limits of the State.*" See 3 Cranch R. 174; 3 Wheat. R. 545. The Ohio court says similar decisions have been made in other States. See 2 McCord, 331; 3 Mass. 271; 1 Pick. 263; see also 7 vol. Ohio Rep. page 525.

The counsel for plaintiff in error deem it unnecessary to add other authorities to those cited as to the proper construction and meaning of the term "beyond sea."

The only remaining question which they will consider is, what statute governs this case. The notes were executed prior to 1830, and the right of action accrued to the plaintiff's intestate upon the notes as they severally fell due in 1831, in 1833 and in 1834, so that, at the time the notes were given and the cause of action accrued, the statute of 1825 was in force. By this statute the exception is made in favor of persons "beyond sea." This suit was brought in 1848, and by the statute of limitations, (Rev. Code 1845) it is provided in the 16th section of the 3rd article of the statute of limitations as follows: "The provisions of this act shall not apply to any actions commenced, nor to any cases where the right of action or of entry shall have accrued before the 1st day of December 1835, but the same shall remain subject to the law then in force." And by the statute of 1835, then in force, that is, on the 1st December of that year, there is this provision in the 11th section of the 3d article of the limitation law of 1835:

"The provisions of this act shall not apply to any actions commenced nor to any cases where the right of action or of entry shall have accrued before the time when this act takes effect, but the same shall remain subject to the laws now in force."

By these provisions, the reservation in the act of 1825, in favor of persons "beyond sea," is preserved to the plaintiff in error, if to be beyond the jurisdiction of the State, is to be "beyond sea." This court has already decided a similar question as to the operation of the statute of 1825, upon the rights of a party under that statute, suing in the year 1840, when the statute of 1835 was in force. See 7 vol. Mo. Rep. page 241, King vs. Lane.

The counsel for the plaintiff in error, for the reason above set forth, hold the verdict and judgment of the circuit court to be erroneous, and it should be reversed.

### STRINGFELLOW for defendant in error.

The expression "beyond sea," as used in the statute of 1825, must be held qualified by other expressions in the same act. The supposition that those words were borrowed from the English statutes, and are held to convey the meaning there attached to them, may hold where there are no other words to explain them. But when they are accompanied with the expression, "beyond the limits of the United States," it is manifestly more reasonable to hold, that they too, should, in analogy to the English meaning, "beyond the realm," be construed to mean beyond the United States. But when we find that the condition upon which the "absence" is removed and the statute again commences running is the "return into the United States," it cannot be doubted that those words should mean out of the United States. Such has been the construction given in Massachusetts to the term "beyond the seas, out of the United States." In those States in which the terms "beyond seas" are held to mean out of

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the State, they are either insolated or accompanied with expressions such as "out of the State; "return into the State," showing that it was intended to make them mean out of the State. 20 Pick. 301; Opinion of Judge Napton in *Shreve vs. Whittlesey*, 7 Mo. R. 475.

RYLAND, Judge, delivered the opinion of the court.

The single question for our adjudication arises upon the construction of the term "beyond seas" in the statute of limitations passed by our legislature in 1825; as that statute must govern this case.

This question has heretofore come before this court.

In the case of *Shreve vs. Whittlesey, adm'r. &c.*, reported in 7 Missouri Reports page 475, the majority of the judges then constituting this court, decided, that the term "beyond seas" meant in that statute "out of this State."

Judge Napton dissented from this opinion. Although I have great respect for the opinions of my predecessors, I nevertheless have never entertained a doubt of the correctness of the views of Judge Napton in his dissenting opinion in the above case; and I am constrained to adopt them as the proper construction of the above phrase, in that statute. The following is the opinion of the dissenting judge, in the above case:

"I am of opinion that the words "beyond seas," in the act of February 21, 1825, mean what the words literally implies. The construction given to those words in England, or in other States of this Union, cannot have sufficient weight, to counterbalance the construction which the Legislature of this State has given to those words in the very act itself. The third section enumerates the same disabilities as the first, and instead of speaking of the removal of these disabilities in general terms, such as were used in the first section, it proceeds to describe particularly in what way each disability could be removed. The counterpart, to the words "beyond seas" is the phrase "*by coming into the United States*" The Legislature have not varied the disabilities described in the third section, from those enumerated in the first; nor is there any reason why they should be different in real actions from what they are in personal, except in point of time. The words "beyond seas" then in the third section, the Legislature have themselves interpreted to mean "without the United States," and I see no way in which a similar construction of the same words in the first section can be avoided." I fully concur in this construction.

The instructions then given below in this case, were based upon this construction of the above act; and are in my opinion correct. I am then for affirming this judgment and Judge Birch concurring herein, the same is affirmed.

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ISBELL vs. THE STATE.

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ISBELL *vs.* THE STATE.

Where an appellant makes no point for the consideration of the supreme court, and the record presents no error, the judgment of the court must necessarily be affirmed.

APPEAL FROM NEWTON CIRCUIT COURT.

STRINGFELLOW, Atty. Genl. for the State.

If it be possible to draw a good indictment against one who violates the law concerning dram shops, then the indictment in this case was properly sustained.

Judge BIRCH, delivered the opinion of the court.

This was a prosecution for selling liquor without license, in which the defendant plead guilty, with the reliance, apparently, that the judgment would be arrested upon the grounds of his subsequent motion, which alleged the insufficiency of the indictment &c., as we find no brief in the case, and have been unable ourselves to detect any radical insufficiency in the indictment, the judgment of the circuit court is of course affirmed.

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# SUPREME COURT.

MARCH TERM, 1850.

## BENJAMIN CLARK *vs.* TIMOTHY C. CONDIT.

A, executed a note to B, for the purchase of a tract of land on which C, had a mortgage. The note was by agreement, to be paid by instalments, to meet the instalments on the mortgage; A, failed to pay B, by which B, was prevented from paying the mortgage debt. C, foreclosed his mortgage, and A, became the purchaser of the land which was sold to satisfy the mortgage debt. B, obtained a judgment at law, against A, upon the note, A, filed a bill asking to be relieved from payment of the judgment. Held that A, by his own fault caused the failure to pay the mortgage debt, and is not entitled to relief.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

### MUNFORD for appellant.

The court raised the question whether or not the judgment at law, was not a bar to the relief now asked in equity, it is not the judgment at law admitting it to be right, only determines that Condit was entitled to have a judgment on the note *vs.* Clark, because he did not pay off the mortgage.

But Clark had no right, at law, to have a judgment against Condit at law, for his purchase money for a breach of covenant on the warranty in the deeds notwithstanding the same facts, were before the court at law, that are now before this court as a court of equity, yet the remedy on these facts in equity, is entirely different from what it was at law, the court holds that at law Condit was entitled to his judgment, and that the property having been sold under the mortgage was no defence, we could not at law, have judgment on the covenants in his deeds for the purchase money. And the question now is, has not Clark the right to come into equity and have a decree for his purchase money, and have one set off against the other. If a court of equity cannot do this, then I have mistaken all its powers, though these facts were before the court at law, yet they were not so involved in that litigation that any remedy could be had on them. The case in 7 vol. Mo. Rep. *Burtons adm'r. vs. Rector*, p. 529, will not turn the parties round to a suit at law, where the title has failed, and it cannot be pretended that we got any land by Condit's deed. If the court decrees that Clark is entitled to no relief here, if he sues on his deed for the purchase money, may not this decree be plead in bar to that action then it is apparent that this court should now finally settle the entire subject of litigation. As to equity, jurisdiction. See 7 Cranch. *Marine Ins. Co. vs. Hodgson*, p. 336.

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**FIELDS and HALL** for defendant.

- 1st. There is no equity in the bill of the appellant. Clark vs. Condit, 11 Mo. 79.
- 2nd. The whole matter was submitted to a court of law, and there adjudicated.

**Judge BIRCH** delivered the opinion of the court.

After giving to this case the most patient consideration, and reflection, we have arrived at the conclusion that it is not one which can now consistently or rightfully invoke the interposition of a court of equity. Referring, therefore, to the report of the same case, (at law,) which will be found in the 11th volume of the opinions of this court, the decree of the chancellor is affirmed, and the bill thereby dismissed.

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**JEROME B. TIMMONS vs. HENRY CHOUTEAU, AMADE VALLE  
AND NEREE VALLE.**

The defendant filed a demurrer to complainant's bill, which was sustained by the court, and leave given to amend. At the succeeding term of court, the complainant having failed to amend, the court dismissed the bill absolutely.

Held, that there being no bill of exceptions showing the terms upon which the leave to amend was given to complainant, the presumption is that the court properly dismissed the bill, but should have dismissed it *without prejudice*.

ERROR TO ST. LOUIS CIRCUIT COURT.

**CROCKETT** for plaintiff.

1st. That the demands which occurred originally against Henry Chouteau was properly embraced in the bill against the defendants jointly. Because it is expressly charged in the bill, that upon the establishment of the house of Chouteau & Valle, "all the business books of accounts, debts, &c., of the house of Henry Chouteau were transferred and turned over to the new firm, who assumed upon themselves the settlement of all business connected with the business of Henry Chouteau." Plaintiff continued in the employment of the firm, on the same terms as he had before been in Chouteau's service. It was in fact a continuation of the business of the same house, assuming upon the new firm the debts and liabilities of the former house. Upon



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the facts charged in the bill, it is evident that the note executed by complainant was intended by defendants to embrace all demands, as well those claimed to be due to Henry Chouteau, as those to the firm. The bill, therefore, properly included the debt to Henry Chouteau as one of the objects of the bill was to be relieved against the note and mortgage alleged to have been fraudulently procured, and which included that debt as one of the items of alleged indebtedness on which the note was founded. The transaction had become so blended together as that *they could not be separated*. 1 J. J. Marshall, 81.

2nd. But if it be assumed that the demand against H. Chouteau was an entirely distinct matter, not connected with the subsequent transactions with the firm, then as there was no ground in the bill for either relief or discovery against Chouteau in his individual rights, the insertion thereof in the bill does not render it multifarious. 2 Danls. Chy. Pr. 14; Varick vs. Smith, 5 page, 137; *ibid*, 254.

3d. It is sufficiently charged that the note and mortgage were obtained either by fraud or were founded in mistake; that the plaintiff did not owe the amount embraced in the note and mortgage, and which were, therefore, without consideration and ought to be cancelled. But if the note and mortgage were valid, still as the bill was for a settlement of accounts, and averred a balance to be due exceeding the note and mortgage, the demurrer ought not on that ground to have been sustained.

4th. That the averments in relation to the sale of the Mermaid, were well made and if true, entitled the complainant to a credit with the defendants to the amount of the value of his interest.

5th. That the 4th cause of demurrer, if three would not defeat the complainants recovery, as there would still be a balance due, if the allegations of the bill are true. But the bill does sufficiently charge that the consideration of the 2nd note was the surrender of the first one.

6th. The omission to file an exhibit with the bill is no ground of demurrer. It is a matter of proof to be produced on the trial. If the defendant deems the production of the exhibits material to enable him to answer, the proper course is by motion that the complainant, be required to file his exhibits and an extension of the time to answer until the exhibits are filed—the simple omission to file cannot be taken advantage of on demurrer.

7th. The other owners of the Mermaid and Quincy were not necessary or proper parties to the bill, the bill would have been multifarious if they had been made parties. They are in no manner interested in the subject matter of litigation, or at all interested, only in one branch of it—no decree could have been rendered against them in this suit.

### SPALDING and TIFFANY for defendants.

1. The court did right to dismiss the bill for want of due prosecution. Leave was asked and given to amend on 20th May, 1846, more than six months after, no amendment having been made, the bill was dismissed.

2. Daniels Chy. 935. If on hearing of a cause, it is ordered to stand over to make new parties by amending bill, in pursuance of which plaintiff amends, but does not proceed further, defendant may move to dismiss bill, and is not bound to set it down again for hearing. *Ibid* 945, 944.

3. There is no bill of exceptions and showing what took place at the dismissal of the bill; nor what laches complainant may be guilty of, beyond what appears on the face of the record. Every presumption is made that the court below did right. 7 Mis. Rep. 293.

Six months had elapsed and no amendment had been made, and the court below, with the counsel before it to make explanations, and with a full knowledge of all the facts and circumstances, which this court cannot have, because there is no bill of exceptions, was of opinion that there had been gross laches and dismissed the bill. How can the supreme court say that the court below did wrong? How can it know that there had not been a time agreed on in which to amend: or that complainants counsel had at his peril, undertook to amend or take steps in the case?

## JEROME B. TIMMONS vs. HENRY CHOUTEAU, AMADE VALLE &amp; NEREE VALLE.

The demurrer was properly sustained by the court below.

The bill was multifarious. It joined together complainants individual account with Henry Chouteau as clerk in a store, with his account as such clerk against Chouteau and Valle, and with his account as clerk and first owner of two steam boats at different times. 11 Miss. Rep. 267, Ferguson vs. Paschall; 9 Miss. Rep. 293; 4 Miss. Rep. 428.

The bill prays that a decree may be made striking the balance, and ordering the defendants to pay it to complainants. Of course the court is called on to pass on all the items of the account, and among others, upon the dividends or shares in the earnings of the two boats, and therefore upon the accounts of the boats, for the dividends are floating and uncertain in amount until the final settlement of the boats business, as between part owners; and part of the amount is against Chouteau alone, and part against him with Valle.

The second cause of demurrer, is that the note complained of is not sufficiently alleged to have been mistaken in amount, or that it was fraudulent, or that it included, or was intended to include the balance of account between the parties.

There is in the bill no specification of what the fraud in the note consists; nor is there any allegation that the note was given for the balance as claimed by Chouteau & Valle due from complainant.

The only thing said is, that the note and mortgage are fraudulent and void.

Third cause of demurrer, is the sale of the boat by the mortgages.

This sale passed only such right as Chouteau & Valle had a redeemable interest.

The bill does not show what the note was given for; whether for the matters of account between the parties or other matters.

The exhibits, one of which is a part of the bill, were not filed. This was demurrable, so far as the exhibits were made parts of the bill.

The decision made in 11 Mis. Reports, 274, relates to exhibits properly so called, that is, papers filed with the bill, and not made parts thereof. If they are made parts of the bill by its terms, they are as much a part of it as any other portion of it. One of them was the mortgage. This was made part of the bill, but was missing.

The proper parties are not made to the bill. On the plaintiff's own showing, the accounts between the joint owners of the two steam boats were involved and would have to be taken, and of course the other owners should have been made parties, otherwise the dividends that might be credited to complainants in this suit, would not be final. They might be too much or too little. The whole accounts of the two boats were involved, and had to be examined, otherwise the dividends could not be ascertained that should be credited to complainant.

The last cause of demurrer assigned, was that there was no equity in the bill; in other words, that if there was any thing due to complainant, he could sue for it at law. He does not allege any necessity for want of testimony, for appealing to the conscience of defendants; but states that they owe him a debt, and that they claim set-offs which are for too large an amount, &c.

According to his story, they owe him a large amount for services rendered them as clerk, and for moneys had and received, &c. Then why not bring his suit at law? 1 Story's Eq. sec. 459.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff in error filed his bill of complaint in the Saint Louis circuit court, in chancery, against the defendants in error, on the 30th of Oct. 1845. On the 5th of December in the same year, being the November term of said court, the defendants filed their demurrer to the complainants bill—At the April term of said court 1846, the court sus-

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tained the demurrer : and on motion leave was given to the complainant to amend his bill. At the November term 1846 on the 23rd day of the month, the complainant having failed to amend his bill, the court dismissed the bill at the costs of the complainant. In October 1849 the complainant sued out his writ of error, and brings the case before this court.

From an examination of the record and proceedings in this case it will not be necessary for this court to take any notice of the bill of complaint and the matters therein set forth ; nor of the action of the court below in sustaining the defendant's demurrer to the bill. The court below on sustaining the demurrer of the bill, granted the complainant, on motion, leave to amend his bill. We find from 20th May up to 23rd November, that the complainant took no steps in his suit, made no amendment to his bill ; and that on the last mentioned day the court dismissed the bill, at complainants costs. No bill of exceptions was filed in this case. We cannot see upon what terms the leave to amend may have been given as to time ; nor but that the complainant, may have been guilty of gross laches in the prosecution of his suit. We must presume in the absence of every thing to the contrary, that the court below decided correctly upon the facts as they appeared before it. Before that court was the complainant by his counsel ; and likewise the defendants. It is fair to presume that every thing was done properly in the premises—and nothing to the contrary appearing by any bill of exceptions, we feel unwilling to disturb its judgment.

However we would have been better satisfied, if the court below had dismissed the bill *without prejudice*. This court will therefore so far only reverse the judgment of the court below, as to direct the dismissal of this bill to be without prejudice, but at complainants costs.

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JOHN H. HARDISON vs. STEAM BOAT "CUMBERLAND VALLEY."

1. Circuit courts, and the "St. Louis court of Common Pleas," have power to *affirm* the judgments of justices of the peace on appeal.

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2. If a party who appeals from the judgment of a justice of the peace in St. Louis county to the court of Common Pleas, fails to pay to the clerk the jury fee as required by the act approved 29th January 1847, the court may declare that the judgment of the justice shall be affirmed upon the appellee's filing a proper transcript and paying the fee.

#### ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

##### G A R E S C H E for plaintiff.

It is alleged that the court below erred as follows :

1st. In overruling the first motion of the plaintiff to set aside the affirmance of the judgment, the reasons therein stated and facts set forth in the affidavit, filed in support of the motion being sufficient and valid in law, the act of gen. session of 1847 page 68 is intended only to promote the payment of jurors, and when the payment of the fee required by that act was omitted by mistake, and altered immediately upon discovery of such mistake, it was error in the court to refuse trial in the case upon its merits in consequence of such omission.

The set off filed in the justice's court exceeds the jurisdiction of the justice of the peace; the matter therefore, upon which the judgment of the court below was founded, was never properly before said court. See Rev. Stat. 1845, page 643, sec. 13; also the case of Robinett vs. —9th Mo. Rep. 246.

The set off claimed by the defendant is due to a person other than the defendant. Mutual debts only may be set off. See Rev. Stat. 1845, page 1005, sec. 1. They must be due in the same right; demands can only be set off between parties in the character in which they are sued. The set off contained a claim for liquidated damages. See *Alexander vs. Hayden*, 2d Mo. Rep. 229.

2nd. That the court erred in overruling the second motion of plaintiff to set aside the judgment, for reasons above stated.

##### H U D S O N for defendant.

1. The plaintiff by his own affidavit filed in the court below, shows that he had not complied with the statute, and his case was not properly in court. See Sess. acts, 1847, page 68.

2d. That by the practice in the court of common pleas, (which has been sanctioned in this court) when the appellant from the judgment of a justice fails to file a transcript as required by the statute, the appellee may bring into court a transcript, and by paying the jury fee, &c. have the judgment of the justice affirmed; this was done in the case now under consideration.

3d. This court should not look into the transcript of the proceedings before the justice. The only question now to be considered is whether the plaintiff took all necessary and proper steps to perfect his appeal; if he did not, then the court of common pleas did right in affirming the judgment of the justice.

4th. The setting aside of the judgment below, was a matter left to the discretion of the court, and the exercise of that discretion should not be disturbed, unless grossly abused.

##### R Y L A N D, Judge, delivered the opinion of the court :

John H. Hardison, the plaintiff in error, sued the steamboat Cumberland Valley, before a Justice of the peace, in Saint Louis county for work and labor done and for materials furnished said boat. The account of the plaintiff amounted to sixty one dollars.

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 JOHN H. HARDISON vs. STEAM BOAT CUMBERLAND VALLEY."
 

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The following set off was filed before the Justice, (against the plaintiff) viz.

JOHN H. HARDISON,

To A. BENNETT,

Dr.

|                                                                                                                      |          |
|----------------------------------------------------------------------------------------------------------------------|----------|
| To use of steamboat Cumberland Valley, and the great wreck pump 16 hours to pump the Light-Foot at \$4 per hour..... | \$ 64 00 |
| A pair of Blocks and Falls.....                                                                                      | 10 00    |
| Tools in clearing out Light-Foot .....                                                                               | 2 00     |
| Damage in not fulfilling contract in caulking C. Valley....                                                          | 30 00    |
|                                                                                                                      | <hr/>    |
|                                                                                                                      | \$106 00 |

The suit was tried before the justice on the 19 December 1848: Upon the plaintiff's request, a jury was empannelled, who after hearing the evidence, returned their verdict in favor of the defendant for the sum of \$64. The plaintiff on the 26 of December following, filed his affidavit for an appeal, which was allowed him, and the justice certified the transcript on the 19 January 1849.

From the record of the proceedings of the court of common pleas, I find, that on the 26 day of February 1849 the following order was made in this case. "Now at this day comes the defendant, by his attorney, and files a transcript of the record and proceedings had herein before the justice, and on his motion it appearing to the court, that said plaintiff has failed to prosecute his appeal, by the payment of the jury fee, by the statute in such case required. It is considered by the court, that the judgment herein as rendered by the justice be affirmed, and that said defendant recover of said plaintiff, and Terry M. Little the security in the appeal bond, the sum of sixty four dollars, for its debt, and also its costs and charges herein expended, and have thereof execution."

After the affirmance of the judgment by the common pleas, the plaintiff on the 28th of February 1849, filed the following motion to set aside said affirmance, viz. The plaintiff, by A. P. and P. B. Garesche, comes and moves the court to set aside the judgment in this case, for the following reasons.

1st. That the plaintiff was surprised thereby, for reasons set in affidavit herewith filed.

2nd. That the demand of set off in the court below exceeded the jurisdiction of the justice.

3rd. That the judgment is otherwise defective, illegal and void. The following is the affidavit:



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The plaintiff John H. Hardison in the above entitled cause comes, and in support of his motion filed herein by his attorneys, Garesche, praying the court to set aside its judgment (viz) that the judgment of the justice be affirmed, and grant him a new trial, alleges as follows: that he is greatly surprised by the judgment, he having used due diligence and spared as he supposed, no effort to secure a rehearing before your Hon. court—that being injured, by the judgment of the justice and greatly aggrieved, not for the purpose of delay or vexation but with the sincere desire to seek redress, he appealed to your honorable court, that he did so acting under the advise of his counsel, learned in the law, that he had just legal and equitable defence. Your affiant further declares that he went to the justice before whom the cause was tried; he enquired what costs were necessary to be paid in order to enable him to carry his appeal to the upper court, and that the justice's reply that one dollar and a quarter would suffice, he paid that sum to the justice, in the belief, that it was all that was required. That being afterwards advised by a friend, that a jury fee would be required to be paid before his appeal would be perfected, he said that he had paid it, meaning the one to the justice and ignorant that any other was required; yet desirous to be safe, he consulted one of his counsels, P. B. Garesche, whether such a fee was due, who in reply, asked of plaintiff if he had not paid the justice all costs necessary to take the appeal; plaintiff replied that he had, and counsel then advised him that nothing more was required of him; that counsel were looking for the case and could not know where it was, that it had not been set, this was on the 22nd day of February A. D. 1849; plaintiff then relied on counsels declarations, and though desirous to do all in his power, and having done all in his power to procure and perfect his appeal, finds himself frustrated, because as he is informed and believes your honorable court has affirmed the judgment of the justice.

JOHN H. HARDISON."

Which was regularly sworn to before the clerk of said court. The court of common pleas overruled this motion, and the plaintiff excepted. The plaintiff then filed his second motion, praying the court to set aside its judgment affirming the judgment of the justice and assigned the following reasons.

1st. That the justice had not jurisdiction of the set off made by the defendant to the plaintiffs demand.

2nd. That the set off claimed by defendant is due to a person other than defendant.

3rd. That it is for an amount exceeding jurisdiction of justice.

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JOHN H. HARDISON vs. STEAM BOAT CUMBERLAND VALLEY.

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4th. That the judgment of the justice is otherwise illegal, irregular and void.

Which said second motion was likewise overruled, and by plaintiff excepted to.

From the above statement it is plainly to be seen, that the only questions properly before this court for adjudication are—was the court of common pleas authorised to affirm the judgment of the justice of the peace?

And did it exercise soundly its discretion in overruling the plaintiff's motion to set aside its judgment in affirmance?

These questions do not extend to any irregularities, errors, or imperfections in the proceedings before the justice of the peace, if any such there be. This court cannot go beyond the action of the common pleas in affirming the judgment and in refusing to set its own judgment of affirmance aside. For the proper understanding of these questions, recourse must be had to the statute of the State: The 23 section of the 8th article of the act concerning "Justices' courts" reads thus: "In all cases of appeals from a justice's court, if the judgment of the justice be *affirmed* or if on trial anew in the circuit court, the judgment be against the appellant, such judgment shall be rendered against him and his securities in his recognizance for the appeal."

I am unwilling to say, that the court of common pleas has no authority to affirm the judgments of justices of the peace: that court having the same power and authority in cases of appeals from justices of the peace in Saint Louis county as the circuit courts have in the State at large. In the section above quoted, it is plain to be seen that the legislature supposed the circuit courts had power to affirm such judgment. I shall answer then the first question in the affirmative, believing that the power to affirm the judgments of the justice of the peace on appeals is in the circuit courts, and also in the court of common pleas in Saint Louis county, and whenever such power appears to have been soundly exercised, I am not willing to disturb the judgments of these courts.

The 3rd section of the act to promote the payment of jurors in Saint Louis county, approved January 29, 1847, declares that "on the filing of every declaration, petition in debt, bill in chancery or other original statement of cause either in law or equity in Saint Louis circuit court, or court of common pleas, the sum of two dollars shall be paid to the clerk of the court as a jury fee; also on the filing of any appeal from a justice of the peace to either of said courts, the clerk shall receive from the appellant one dollar as a jury fee." This statute makes it the duty

## STEAM BOAT FALCON vs. PATRICK DONOHUE.

of the clerks of these courts to certify, on the first Monday in each month to the county treasurer, the amount received, stating particularly the source, whence derived and to pay over to him the amount of money thus received. These courts then may fix their rules, require the payment of the one dollar to be made to their respective clerks, by the appellant, on every appeal from a justice of the peace; and in default of such payment, may, upon the appellee's filing such transcript and paying the dollar as required, declare, that the judgment of the justice shall be affirmed. From the record of the proceedings in this case, it is clear, that the jury fee of \$1,00 was not paid to the clerk of the court of common pleas by the appellant; the only excuse offered to that court for the failure to pay this fee amounts to nothing more than the party's ignorance or neglect. The court of common pleas commences its session on the first Monday in February; the transcript was made out by the justice of the peace on the 19th of January previous; on the 26th of February the appellee files a transcript of the proceedings before the justice, and moves to have the judgment below affirmed.

The appellant stands by idle, from the first of February, until near the last day of that month; and excuses himself by stating that he was looking for his case but could see nothing of it!

This case is one which addressed itself to the sound discretion of the court of common pleas. That court is fully competent to look into the circumstances which surrounded it, and to decide upon them as justice and law required, and having done so, I am not disposed to disturb its judgment. The judgment is affirmed, my brother judges concurring herein.

## STEAMBOAT FALCON vs. PATRICK DONOHUE.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

B. A. HILL, for defendant.

*The judgment before the justice was entirely annulled by the appeal, and the Boat released from the lien thereby. Turner vs. Northcut and McCarty, 9 Mo. 251, 255, 6 in point.*

## STEAMBOAT FALCON vs. PATRICK DONOHOE.

The appeal from the justice was not an appeal of the Boat, but the appeal of W. H. Parkinson, captain, who became the *appellant*. The Boat could not appeal, 329, page 186, Rev. Code, 1845.

The proceedings against the Boat were *in rem*, the appeal introduces the appellant and security into the case as appellant and security; the judgment of affirmance is upon the failure of the *appellant* to pay the jury fee. Parkinson is the appellant, and he is the party in default and a judgment is entered against him *in personam*; and the same judgment is entered against the Boat, to wit: a judgment *in personam*, or a proceeding *in rem*. This is manifest error.

But if it is held, notwithstanding, that a judgment might be entered against the Boat, an appeal then by § 9 and § 20, page 185 R. C., "*the judgment should specify to what class of liens the demand belonged*" This is not done, but a general judgment is rendered against the Boat, and the appellant and the security commingling proceedings *in rem* and *in personam* together, and taking a judgment against the Boat "*not authorized by law*."

The *spirit* of the act concerning Boats and Vessels, is manifestly, to release the lien on the vessel when she is bonded, or when an appeal is taken from a justice. See § 21, page, 185, R. C. An appeal releases the Boat upon the bond of the appellant and his security, and the act concerning appeals, only permits judgment against the appellant and his security, *in personam*.

If all other things, however, were regular, the *feri facias*, in this case, is wholly irregular.

The Rev. Code § 20 p. 185, provides that "a special writ of *feri facias* shall be issued thereon, specifying the class of liens to which the demand belongs, "commanding the sheriff to *seize* the Boat to satisfy the judgment, &c." The *fi. fa.* issued in this case, is a general one upon a general judgment.

## GARDNER for appellee.

The judgment in this case is substantially correct, it being an affirmance of the judgment of the justice, and the only judgment that could be rendered by the court, and is a judgment against the Boat, the appellant and the securities in the recognizance as they appear in the recognizance. Revised Statutes Mo. justices courts, act—art. 8, section 4 as to form of recognizance. Sec. 23d. of same act, and the case Hardison vs. Steamboat Cumberland Valley, decided at this term of the court.

It is contended by the appellant in this case that by giving a recognizance for an appeal the Boat was discharged from the lien of the plaintiff's demand. This is manifestly incorrect, as in all suits before justices of the peace under the "act concerning Boats and Vessels," the proceedings must conform to the law, governing other cases in justices courts. See section 24 of the "act concerning Boats and Vessels."

The only way by which a boat can be discharged from the lien of the plaintiff's demand is by giving a bond before final judgment, as required by sec. 9, of the act before referred to.

The execution issued in this case, was authority for the sheriff to seize the Boat, and then upon a proper statement of the facts to make an application to the court for an order of sale, as provided for, by section 11, of the act before referred to.

The execution if informal or incorrect could be recalled by the court, and amended—no informality in the execution would be caused for the court to set aside the judgment—it could neither render it void or even voidable.

## RYLAND, Judge, delivered the opinion of the court.

This case comes within the principles of the decision made at this term by the court, in the case of Hardison vs Steamboat Cumberland Valley; reference is therefore made to that decision as the one that will govern this.

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JACKSON W. WHITE vs. JAMES ZULE.

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## JACKSON W. WHITE vs. JAMES ZULE.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

WHITTELSEY for plaintiff.

The single point presented in this case, is, did the court below commit error, in affirming the judgment of the justice, because the appellant had failed to file his appeal from the judgment of the justice, by neglecting to pay the jury fee of one dollar?

Acts of 1847, p. 69, sec. 3, provides "that on a filing of any appeal from a justice of the peace to either of said courts (St. Louis circuit court and common pleas) the clerk shall receive from the appellant one dollar as a jury fee."

The appellant below failed to do this, and the appellee paid the jury fee, filed the appeal, and had the judgment of the justice affirmed.

Revised code 1845, p. 671, sec. 23, provides for affirming the judgment of the justice, which applies to cases where the party fails to prosecute his appeal with effect.

Rev. code 1845, art. costs, p. 244, sec. 16, provides, "that in all cases when appeal from a justice shall not be prosecuted according to law, the judgment shall be affirmed, and the costs adjudged accordingly."

The appellant having failed to pay the jury fee of one dollar, his appeal was not filed on the first day of the term, as by law required, and his appeal not having been filed, he *failed to prosecute* his appeal as by law required, and the judgment of the justice was therefore properly allowed, upon the appellee's producing the papers, paying the jury fee, and filing the appeal.

The counsel for the appellee, therefore submits that there was no error in the proceedings of the court below, and its judgment affirmed.

The case of Hardison vs. Cumberland Valley, exactly covers this case, and settles the point involved in it of the authority of the court of common pleas, to affirm the judgment for want of payment of the jury fee.

RYLAND, Judge, delivered the opinion of the court.

This case comes within the principles of the decision made at this term of the court, in the case of Hardison vs. steam boat Cumberland Valley—reference is therefore made to that decision as the one that will govern this.

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 GUY MORRISON vs. JAMES F. SMITH & SOLOMON H. ROBBINS.
 

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**GUY MORRISON vs. JAMES F. SMITH & SOLOMON H. ROBBINS.**

The holder of a negotiable note, severally endorsed in blank by two or more persons, has no right to fill up one endorsement over the signatures, so as to make the assignment to him the joint act of all those whose names are thus written upon it.

**ERROR TO ST. LOUIS COURT OF COMMON PLEAS.**
**STATEMENT OF THE CASE.**

The declaration set out a promissory note made by James S. Carter and Samuel H. Carter, and A. Grantham in negotiable form and payable to Z. T. Woodfolk and F. W. Stephenson, and by them endorsed to the defendants, and by the defendants endorsed to the plaintiff, demand and refusal of payment at the maturity of the note and notice to the defendants.

At the trial before the court, without a jury, the plaintiff gave in evidence a note made and endorsed as set out in the declaration; the defendants by counsel admitted that payment of the note had been duly demanded and refused, and defendants had due notice of it; and the plaintiffs counsel admitted that there at the trial he had filled up the endorsements by writing over the names of Woodfolk & Stephenson the words "Pay the within to James F. Smith and Solomon H. Robbins;" and over the names of the defendants, "Pay the within to Guy Morrison," and no other evidence was given by either party,

Whereupon, the court decided that the plaintiff could not recover, upon the ground that the plaintiff's counsel had no authority to write over the name of the payees the joint endorsement to the defendants and over the names of the defendants. The endorsement to the plaintiff, was to make that endorsement the joint endorsement of both the defendants, and the foundation of a joint recovery against them, but that the same should have been filled up so that the endorsement of the defendants should have been several and consecutive and not joint, so the last endorser would not be precluded by a joint judgment from recovering against his prior endorsee, and that in the absence of further proof of a joint endorsement, the presumption of law was in favor of holding it to be a several endorsement, and a joint recovery could not be had, to which opinion and decision the plaintiff excepted, and took a nonsuit with leave to move to set the same aside.

The plaintiff filed a motion to set the nonsuit aside, which was overruled; the plaintiff excepted to the overruling, and brings the case here by writ of error.

**GAMBLE & BATES for plaintiff.**

1st. The court erred in deciding as a matter of law upon the trial of the issue that the plaintiff was not entitled to recover upon the evidence that fully proved his declaration. 12 Miss. Rep. 298, *Berry vs. City of St. Louis*, ib. 307, *Mullen vs. Pryor*.

2nd. The endorsements upon the notes sued upon being in blank, the holder had a right to fill them as he thought proper. *Chitty on bills*, 133.

3d. The declaration is upon a joint endorsement by Smith and Robbins, and so alleges it to have been made, the execution of such endorsement is not denied on oath, and an endorsement sustaining the declaration is given in evidence; the court erred in requiring any further proof by plaintiff.

**HILL for defendant.**

1st. The endorsement of Smith and Robbins were on the back of the note, several in form and in blank, and a joint endorsement cannot be presumed, in such a case, it must be shown.



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GUY MORRISON vs. JAMES F. SMITH & SOLOMON H. ROBBINS.

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2nd. The joint endorsement of Woodfolk & Stephenson raises no presumption of a joint endorsement to James F. Smith and S. H. Robbins, no more than the endorsement of a partnership, would have done.

3rd. The rule applicable to all commercial paper is in force in this case, and the holding these defendants as joint endorsers would authorise all endorsements to be held to be joint; would destroy and violate the right of the last or subsequent endorsee, and overturn all the principles applicable to bills and notes, and the rights and liabilities of endorsers.

4th. The endorsement of this note by Smith, implied an undertaking from him to Robbins, exactly similar to that, which is implied on the part of the drawer, by drawing a bill. Sec. 108, Story Bills; sec. 138, 4 Pick. 385, 19; Pick. 385, 15, Mass. 436, 6 Mass. 356. This rule establishes that the endorsements of parties on the back of a note, are several in law.

5th. The remedy of *Robbins vs. Smith* would be barred by a joint judgment, and there could be no recovery by Robbins vs. Smith for more than one half of the amount of the note.

6th. The endorsement of Smith & Robbins though several on the back of the note, was made joint by plaintiff on the trial, and no other proof of endorsement having been made there was a variance between the proof and the declaration.

7th. The plaintiff asked no instructions, and the reason of the *nisi pro* judge on no grounds, for a new trial.

RYLAND, Judge, delivered the opinion of the court.

The question in this case, involves the right of a holder of a negotiable note endorsed in blank, by two or more persons having written their names thereon, to fill up the endorsement by simply writing over all the names one assignment, so as to make the assignment the joint act of all those whose names have thus been written.

The right of a holder to fill up blank endorsements is unquestionable—this power is given by every one who thus writes his name on negotiable or assignable paper. But this is not the question. Can the holder, instead of filling up from one to another so as to make a regular claim to the last endorser and from him to the holder, make one endorsement over all the names to himself?

I have no doubt, that by the consent or by the agreement of the persons whose names are endorsed on the note, that such may be made a joint endorsement, but without such understanding or agreement each endorser must be considered a separate actor, who assigns the note and who becomes liable by such assignment.

In this case, the plaintiff in error contends that the court below should have given judgment in their favor, because they set out a joint endorsement in their declaration, and proved it before the court. This reasoning is specious. The court below decided that without showing some authority or agreement by the endorsers, that their act was to be considered a joint one, the law presumed it not to be such; and without such authority or agreement or consent on the part of the endorsers, the plaintiffs counsel had no right to make such joint endorsements, and

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THE STATE OF MISSOURI vs. THOMAS SHIELDS, Appellant.

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consequently his act was void and there was no legal proof of such joint endorsement.

I feel unwilling to make any decision, that may unsettle the general understanding of those concerned most in the use of such negotiable paper, as regards the practice and decisions of our courts.

The endorsement of the note by Smith is an undertaking by him to pay Robbins and by Robbins to pay the holder, in the absence of all proof, that Smith and Robbins jointly endorsed the same.

I think that public policy is best promoted by adhering to the practice which makes, these endorsements separate and not the joint act of all those whose names are put on the back of the note.

It has been well observed by the defendants counsel, that the rule applicable to commercial paper is in force in this case, and the holding these defendants as joint endorsers would authorise all endorsements to be held to be joint; and would destroy and violate the rights of a last or subsequent endorsee; and overturn the principles applicable to bills and notes and the rights and liabilities of endorsers.

For these reasons I feel inclined to support the judgment of the court below.

Its judgment is therefore affirmed, Judge Napton concurring in this opinion.

THE STATE OF MISSOURI vs. THOMAS SHIELDS, APPELLANT.

1. In discrediting a witness, a party is not restricted to inquiries into his character for truth, the inquiry may extend to his moral character generally.
2. For the purpose of discrediting a witness, a party may inquire as to her general character for chastity.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

HALL for appellant.

1. Evidence of general bad character of a witness is competent to impeach him. The court therefore, erred in refusing to allow the enquiry to be made of Ferguson, a witness of the State.

## THE STATE OF MISSOURI vs. THOMAS SHIELDS, Appellant.

1 Hill 251; 2 Cowen and Hill 767; Wike vs. Lightner 11 S. and R. 199; Evans vs. Smith, 5 Monroe 363.

2. Evidence of the bad character of a witness for chastity, is also admissible in impeachment of such witness. Evans vs. Smith, 5 Monroe 363.

3. It was error in the court to refuse to tell the jury that the defendant had a right to go to the house of Mrs. King, for the peaceable purpose of seeking an explanation of the maltreatment of his family; though not a jurisdiction of an assault, if one was made, yet if an assault was not the purpose of going there; and the assault grew out of bad blood afterwards engendered, it much mitigates the offence.

4. The court did wrong in excluding the evidence of the threats made subsequent to the assault, after it had allowed the State to enquire minutely, into them on cross examination. The State takes the chance of finding in closer enquiry, something for its advantage. When it has done so and meets only with disappointment, it cannot then denounce and exclude it. It elects to take it when it seems probable it may be advantageous, but rejects that election as soon as it proves otherwise.

### LACKLAND for the State.

The court did not err in sustaining the objection to the first question asked the witness Ferguson. The question was too vague under the circumstances of this case, the defendant had no right to call the character of Mary King in question upon any subjects except two.

1st. The defendant might inquire into her general character for truth and veracity, to show how much faith and confidence the jury ought to extend to her.

2nd. The defendant might inquire into her general character for peace and quietude, as bearing upon the question of provocation. The question was bad, because it was not sufficiently specified towards these subjects.

The court did not err in sustaining the objection to the second question asked Ferguson, as to the general character of the witness Mary King, for chastity. Because her chastity was entirely foreign from the issue, and therefore the question was irrelevant.

The court did not err in giving the instruction for the State. It was for the purpose of excluding the matters testified to, by Elizabeth Hall, which took place long after the assault and battery, and had nothing to do with it whatever.

The court did not err in refusing the instruction asked for by defendant, because admitting for the sake of argument it contains good law, it is entirely inapplicable to this case.

NAPTON, J., delivered the opinion of the court.

Shields was prosecuted before a justice of the peace for an assault and battery, upon one Mary A. King, and being convicted and fined, appealed to the criminal court.

Upon the trial before the criminal court, the principal witness for the prosecution was Mary A. King. And upon the cross examination of another witness for the prosecution, the witness was asked by the defence. "Do you know the general character of Mary A. King, the prosecuting witness?" This question was objected to, and the objection sustained. The witness was then asked, if he knew her general character for chastity, and this question was also excluded.

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ALEXANDER LEE & TERENCE DONOHUE vs. CHARLES CHAMBERS.

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It seems to be the better, and more settled opinion, in discrediting a witness, a party is not restricted to inquiries into the character of that witness for veracity. A bad moral character generally, or a depravity not necessarily allied to a want of truth, may yet to some extent shake the credibility of a witness, and therefore, is a fair subject of investigation. The questions propounded in this case were proper, although they must necessarily, to have had any sensible impression upon the case, been followed by others eliciting the opinion of the witness upon the effect which the general or specific moral depravity spoken of, had upon the credibility of the witness attacked. The entire exclusion of the questions seems to have proceeded upon the ground that general bad character was inadmissible, unless it was a general bad character, for truth and veracity. The judgment must be reversed and the cause remanded.

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ALEXANDER LEE & TERENCE DONOHUE vs. CHARLES CHAMBERS.

In order to enforce a lien given by an act entitled "an act for the better securing of mechanics and others erecting buildings, or furnishing materials for the same in the city and county of St. Louis," approved February 24, 1843, the person claiming the benefit of the act, must commence an action within ninety days after filing the lien.

STATEMENT OF THE CASE.

The plaintiffs in error being building mechanics in the city of St. Louis, and having built a store warehouse for Chambers, the defendant in error, filed their lien in the office of the St. Louis circuit court, and on the 28th day of January, 1847, procured a *scire facias* to issue against Chambers on the lien as filed.

The *scire facias* states that the lien was filed on the 19th day of August, 1846, and within six months after their demand had accrued, that the account so filed was a just and true account of the demand justly due the plaintiffs in error, after all just credits were given. That the demand accrued on account of materials furnished by the plaintiffs, and used in building the house of defendant, under contract with J. L. Kean and Charles Shaw, who were contractors with Chambers, the owner of the lot for the erection of the warehouse, and also for work and labor done by the plaintiffs upon the said warehouse, under contract with said Kean & Shaw, the contractors. That said demand was verified by the affidavit of the plaintiffs, and the amount

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due upon the demand was \$377 50; that the plaintiffs, at the same time filed a correct description of the property to be charged with said lien, describing it in the *scire facias*.

The defendant, Chambers, filed eleven pleas, to seven of which the plaintiffs demurred. The pleas demurred to are the fifth, sixth, seventh, eighth, ninth, tenth and eleventh.

The fifth alleges as a bar to the *scire facias*, that the action was not commenced within ninety days after filing the lien.

The sixth alleges that the plaintiffs did not, prior to furnishing the materials and doing the work, give notice in writing to the defendant, or his agent, of their intention to do the work and furnish the materials.

The seventh avers that the plaintiffs have not made a settlement in writing with Kean & Shaw, the contractors, in respect to the materials and work and labor, and caused the same to be signed by the said Kean and Shaw, and certified to be just, and left with the defendant.

The eighth alleges that the plaintiffs did not make a settlement in writing with Kean & Shaw for the materials and labor, and within ten days from the time the materials were furnished and work done, file with the clerk of the circuit court a copy of such settlement.

The ninth avers that the contract between the plaintiffs and Kean & Shaw, under which the materials were furnished and the work was done, was made prior to the 1st day of August, 1845, and that under said contract a portion of the materials was furnished, and a portion of the work done prior to the said 1st day of August, and then avers that the plaintiffs have not settled with Kean & Shaw for said work and labor and materials, and presented to the defendant such settlement, signed by Kean & Shaw, and certified that the amount appearing by such settlement was justly due to the plaintiffs by said Kean & Shaw, on account of the work and labor and materials.

The tenth plea is like the ninth, except that instead of averring that there was no settlement between the plaintiffs and Kean & Shaw, this plea avers that the plaintiffs did not give notice in writing to the defendant of their intention to furnish the materials and do the work, setting forth the probable value thereof.

The eleventh is like the two last in the introductory part thereof, and then avers that the plaintiffs did not within ten days after demand accrued, file with the clerk of the circuit court a duplicate copy of a certified settlement between them and said Kean & Shaw for said work, labor and materials.

Judgment was given on the demurrers for the defendant, and the case is brought here by writ of error to reverse that judgment.

### GAMBLE & BATES for plaintiffs.

The fifth plea is bad, because the limitation of ninety days allowed for bringing actions under the act of 1843, only applies to the actions which are specially given by that act. See acts of 1835; act of 1841, page 105; act of 1843, page 83.

All the other pleas are bad under the decisions made in 11 Miss. R. 138 and 340.

### HUDSON for defendant.

1. The fifth plea filed by defendant, and to which there is a demurrer, was intended to meet the provisions of the 9th section of the act of 24th February, 1843. See session acts 1842, 3, page 84. This expressly requires that the action should be commenced within ninety days after filing the lien. It is contended that the fifth plea is good under said act, and the court below did right in overruling the demurrer.

2. The 6, 7, 8, 9, 10 and 11 pleas were filed with a view of putting in issue the plaintiffs al-

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leged demand under the provisions of the statute of this State, entitled "an act for securing liens to mechanics and others, approved 19th March, 1845," see Revised Code. Each of the last mentioned pleas put in issue facts material under the last mentioned statute, and if this statute were in force at the time specified in the pleas, then they were pertinent and rightfully pleaded.

3. The *scire facias* does not show on its face sufficient to justify the court in rendering judgment against the defendant and the premises in favor of plaintiffs, and it is perfectly immaterial whether the pleas were good or bad.

4. The only question in this case important to be considered, depend upon the statutes of 1842, 3, Sess. acts, page 84 and Revised Code; statute relative to mechanics liens. These acts of our State legislaturé need only to be examined to enable the court to arrive at a correct conclusion in this case.

Judge BIRCH delivered the opinion of the court.

The ninth section of the "act for the better security of Mechanics and others erecting buildings, or furnishing materials for the same, in the city and county of St. Louis," is as follows:

"All actions under this act shall be commenced within ninety days after filing the lien, and prosecuted, without unnecessary delay, to final judgment."

This act was approved, on the 24th February 1843, and is substantially re-enacted by the 22d section of the "act concerning the revised statutes" approved on the 27th of March, 1845, in these words:

"All acts and parts of acts specially applicable to the city or county of St. Louis, and in force at the commencement of the present session of the general assembly, and not repealed or modified by some act of the present session, specially applicable to said county or city, shall be, and the same are hereby continued in force."

Not perceiving wherein the 9th section of the act of '43 has been changed or modified by any subsequent enactment of the legislature, it must be held to furnish the law of this case. We conclude, therefore, that the 5th plea of the defendant was good in bar of the plaintiffs action; and as this substantially disposes of the case, the judgment of the circuit court is affirmed.



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 WILLIAM BURK vs. JOHN HOWARD.
 

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### WILLIAM BURK vs. JOHN HOWARD.

1. If a woman who usually acts as the agent of her husband in his absence, borrows money and purchases property with it, which is afterwards used and claimed by him, the husband is liable for the debt, although he was never spoken to about it.
2. If a woman who usually acts as the agent of her husband in his absence, borrows money under such circumstances as would make it the debt of her husband, and suffers the same to remain unpaid for more than six years, a promise by the wife in the absence of the husband, would take the debt out of the statute of limitations, and revive it against him.

#### ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

##### HOLMES for plaintiff.

1. The verdict of the jury was flatly against the instructions of the court.
2. That the simple fact that in 1837, the wife was in the habit of doing business for the husband in his absence as his agent, though it may sustain his liability for a loan made at that time, is no evidence whatever of authority to the wife, eight years afterwards, to make a new promise to take a debt, which is barred, out of the statute of limitations. The authority had long since ceased by the total consummation and ending of the subject matter of it. *Sto. Agency* sec. 500, sec. 430, sec. 462.
3. A verdict will be set aside where it is manifestly against the weight of evidence, and much more where there is no evidence to warrant such a verdict in law. *Hartt vs. Leavenworth* 11 Mo. 629; 3 Mo. 484; *Gra. New Tr.* 278, 283, when evidence wholly insufficient verdict will be set aside and a new trial granted.

##### HUDSON for defendant.

1. By the evidence set out in the bill of exceptions it appears that plaintiff was a pilot on the river, and most of his time absent from the State, that his wife was his agent and transacted all his business; she purchased the slave, and borrowed the money to pay for her. After the purchase it appears that Burk took possession of the negro girl, kept her in his family as his servant; interpleaded and claimed her when she was taken by the sheriff on execution against Stilwell, thus recognizing the acts of his wife and adopting her contracts, he availed himself of the benefit arising from the purchase, and in justice ought to pay for the slave. It is contended that the conduct of Burk and his claiming of the slave as his property would be sufficient to render him liable, even if the plaintiff below had introduced no witness to prove the fact that Burk's wife acted as his agent.
2. The admissions of Mrs. Burk while acting as the agent of her husband, are obligatory upon him. See 1 Co. R. 394; 10 John. R. 46, 7; 2 Starkie on E. 42, 3; *ib.* 45, 6; *ib.* 56, 7; *Smith Mercantile Law* Ed. of 1847, 128; *Theobald on Pri. & Agt.* 286, 7.
3. The fact of the plaintiff in error taking possession of the slave and converting her as his property, rendered him liable in this action. 10 John. Rep. 119, 20; *ib.* 46, 47.

##### Judge BIRCH delivered the opinion of the court.

Howard sued Burk, in assumpsit, for money loaned to his wife under the following circumstances: Burk was a steamboat pilot, and while

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absent upon the river his wife was in the habit of transacting business for him as his agent. In the year 1837, Howard was introduced to Mrs. Burk by one Charles Smith, and at his instance loaned her two hundred dollars, for the purpose of purchasing a negro girl. In June 1845, Smith went with Howard to Mrs. Burk for the money, twenty dollars of which she paid him, and promised the balance as soon as she could get it. The defendant was not present on either of these occasions, nor was there any testimony that he had ever been seen or spoken to concerning the transaction. It was in testimony, however, that the negro girl which was purchased with the money, thus borrowed lived in the family of the defendant, and that upon one occasion, when an execution was levied upon her, at the instance of some person, the defendant interpleaded, claiming her as his property, upon this testimony, at the instance of the plaintiff, the court instructed the jury.

1. "If the jury believe, from the evidence, that defendant's wife acted as the agent for him during his absence from the State, and as his agent borrowed money to pay for the negro in question; and so appropriated the money thus borrowed, and upon the return of the defendant to the State the acts of the wife were approved and adopted by him, the jury should find for the plaintiff.

2. "That the fact of the slave in question being kept as a servant in defendant's family, and afterwards claimed by the defendant as his property, in a trial of the right of property before the sheriff, are circumstances from which the jury may infer that the wife of the defendant acted as his agent, and that he sanctioned and adopted the acts of the wife in the premises."

The giving of these instructions was unobjected and unexcepted to by the defendant, at whose instance the court gave the following additional instructions.

1. "Unless the jury believe from the evidence that Mrs. Burk (the wife) had authority from her husband to make the loan in question, or that it was subsequently ratified by him, they will find for the defendant.

2. "Unless the jury believe from the evidence, that the defendant had promised, or authorised his wife to promise, to pay the debt, either verbally before the first day of August, 1845, or in writing after that date, and within six years before the commencement of this suit, it was barred by the statute of limitations, and they will find for the defendant."

The jury having found for the plaintiff, a sum equal to the principal and interest remaining unpaid, the defendant moved for a new trial on the grounds, that the verdict was against the instructions, against law,

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against the weight of evidence, against law and evidence, and because the damages were excessive.

As already remarked, no complaint was made concerning the instructions, and if there had been, we think they were well enough. In reference to the damages, it has been seen that they do not exceed the ordinary interest which the law authorises in liabilities of this nature. From all that appears, either affirmatively, or negatively, the wife was as competent to renew the liability of the husband in 1845, as she was to contract it in 1837 ; so that the only question presented has relation to the weight of the testimony. This court has repeatedly declined to interfere with the verdicts of juries, in cases where the evidence, *as preserved upon the record*, seemed even to preponderate against their finding. The reasons for this need not be re-stated—especially in a case where, according to our judgment, the jury found only such a verdict as we would have found ourselves.

The judgment of the court of common pleas is accordingly affirmed.

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THE STATE OF MISSOURI vs. URIEL WRIGHT.—No. 87.

That provision — in the third section of an act of the General Assembly, entitled “an act to promote the payment of jurors in St. Louis county,” approved January 29, 1847, which requires that a jury fee shall be taxed as part of the costs of every judgment rendered against a defendant in a criminal proceeding — is constitutional.

## APPEAL FROM THE ST. LOUIS CRIMINAL COURT.

Judge BIRCH delivered the opinion of the court.

The court below having, upon the motion of the defendant, struck from the execution which was issued against him, upon a conviction for practising law without a license, the sum of three dollars which was taxed as a jury fee, under the 3d section of the act of 1847, “to promote the payment of jurors in St. Louis county.” The circuit attorney has

appealed to this court, upon the question of the constitutional power of the general assembly, to authorize, and direct the payment of such a fee.

The reliance of the defendant, is based principally upon the 8th and 9th subdivisions of the 13th article of the constitution, commonly called the Declaration of Rights. By these it is enacted "that the right of trial by jury, shall remain inviolate," and "that in all criminal prosecutions the accused has the right to be heard by himself and his counsel; to have compulsory process for witnesses in his favor," and "to a speedy trial by an impartial jury," &c.

It must be apparent that to deny the Legislature, the power to impose a jury fee, carries along with it a denial to impose or prescribe a fee for the clerk who issues, and the sheriff who executes the "compulsory process for witnesses," for they are "rights" to which the accused, occupies precisely the same relation. To state such a proposition, is believed to be sufficient to suggest such consequences as to demonstrate; without argument, that such a construction of the constitution was never designed by its framers, and should not be adopted by the courts.

Juries are but as the courts themselves; part of the machinery of the constitution, and the Legislature, designed to promote and secure the great end of good government; and but for the specific *injunctions* of the constitution to the contrary, the judges too, like the jurors and other officers of the court, might receive their compensation in the shape of *fees* from the parties in default, instead of the "fixed" compensation to which it was deemed better to subject them. The reason for this need not be enlarged upon, it being sufficient to point to the fact that the framers of our system did not perceive the necessity of a similar enactment in reference to the *other* officers and adjuncts of the court, in order to preserve consistency with the other injunctions which has been relied on; namely, "that right and justice ought to be administered without sale, denial or delay."

Upon the whole, we do not deem that any of the great guaranties aluded to, have been invaded or violated by the legislation in question, and concerning the wisdom of the system, it is not our province to enquire or decide. We therefore content ourselves with reiterating what seems to have been the comparatively unobjected and undisturbed contemporaneous and continuous exposition of those, and similar declarations in the American constitutions; namely, that the State had performed its duty when its legislation had furnished the forum and machinery through which those guaranties could be enforced, without requiring a farthing

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in *advance* of the "impartial trial," which has been guarantied to every citizen. If such impartial trial shall result in a verdict to the effect that the citizen has offended "against the peace and dignity of the State," we are not prepared to say, even upon the score of public policy, that he should not be made, if able, to bear the expense of the trial to which he had subjected her.

For these reasons, the judgment of the criminal court is reversed.

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THE STATE OF MISSOURI vs. URIEL WRIGHT.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

Judge BIRCH delivered the opinion of the court.

The facts in this case being precisely as in a case between the same parties (No. 87,) the same judgment will be entered.

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THE STATE OF MISSOURI vs. URIEL WRIGHT.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

Judge BIRCH delivered the opinion of the court.

This case being precisely similar to the one between the same parties (No. 87,) the same judgment will be entered.

## ROBERT HAYS vs. THE STATE OF MISSOURI.

1. An indictment which alleges that the defendant sold liquors "to persons to the grand jurors unknown," is supported by the testimony of a person who swears that the defendant sold liquor to him; unless it further appears from the evidence that the grand jury knew the witness to have been, in fact, the unknown person alluded to in the indictment.
2. A person indicted for selling liquor without license, cannot excuse himself upon the ground that at the time he did the act he was in the employ of another person, and sold it as the agent of that person.

## APPEAL FROM THE ST. LOUIS CRIMINAL COURT.

Judge BIRCH delivered the opinion of the court.

This case presents two questions: First, is an indictment which charges that a defendant sold liquors "to persons to the grand jurors unknown," supported or answered by the testimony of a person who swears that the defendant sold liquor to him? We can see no discrepancy or impropriety in such an every day occurrence, unless it were proved, in addition, that the grand jury *knew* the witness to have been, in fact, the *unknown* person alluded to in their averment, and that is not pretended here. It often happens that a citizen may swear before the grand jury to the commission of such offences with persons unknown to him, and that after the jury have found their indictment accordingly, the witness who was before them dies, or is otherwise prevented from appearing upon the trial. In such cases, other witnesses are produced who prove the commission of the offence, but prove in addition, that *they* knew the parties in selling to whom it was committed. It is conceived that in such cases, it is neither made out that the grand jury found an improper indictment, nor does it involve any variance which would authorise the acquittal or discharge of the defendant.

There is conceived to be even less in the second point. (Whoever, being of legal discretion, acts tortiously, is personally responsible to the injured party; and the fact that it was done as the agent, or by the request or command of a third person, is no excuse.) In analogy to a rule so wholesome in civil cases, it is time it should be written, if it be not already, that in misdemeanors of the class we are considering, all who thus aid, assist or abet are guilty as principals. In fact, no reason is perceived for entertaining such an excuse, in a case like the present, that would not be applicable in reference to graver offences, and the courts should extend to it not the slightest countenance. It may be ad-



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mitted that it would be most appropriate, in all cases, to indict the principal where he was known; but the object of the law should not be defeated by the fact that the owner of a dram shop so managed as to keep himself concealed from the inquest of the State, by interposing another person as the ostensible offender.

From the construction as thus established, no wrong can result of which any citizen can legitimately complain. Every one is presumed to know the penal laws of his State, and he has therefore but to satisfy himself, before taking employment, that his employer is able to indemnify him against the consequences of any illegal act he may commit under his direction—for, if *innocently* done, the same law which holds him responsible to the State, furnishes him an indemnity against his employer. Let the judgment be affirmed.

### DAVID W. MAJOR vs. WESLEY HILL ET AL.

1. Where a debtor without the knowledge of his creditor conveys property to a trustee to secure the debt, it is valid, unless within a reasonable time after the fact comes to the knowledge of the creditor he disclaims it.
2. Where a debtor conveys property to a trustee, to secure specified debts after those debts are satisfied from the proceeds of the property, the balance, if any, should be appropriated in payment of such executions, as would have priority of lien upon the property.

### APPEAL FROM MONROE CIRCUIT COURT.

#### STATEMENT OF THE CASE.

The appellant on 8th of October, 1842, filed in the Monroe circuit court, his bill in chancery against the appellees, and charged in substance as follows: That on the 12th of March, 1841, he had recovered a judgment in the Monroe circuit against William Haines for the sum of \$695 61 cents with costs. That on the 8th of April, 1842, judgments were entered before a justice of the peace of the county, in favor of various creditors of Haines, to the amount of \$420. That in the night of that day, in secret and in confederacy with Wesley Hill, Haines conveyed in trust five negroes, horses, jennies and oxen, to Wesley Hill and nine others, to pay certain debts therein specified, in order to hinder execution, and delay those creditors in collecting their debts; and that Hill proceeded before the execution of the deed to collect the property, and run it out of the county in the night, to prevent any levies of execution; and

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Haines delivered the instrument to the clerk in secret, and in the night time, and without the knowledge of all parties concerned, except said Hill. The complainant, on the 11th of April, 1842, sued out execution on his judgment, by which he made \$400 of his debt out of real estate of Haines, and Haines having no other property but that contained in said deed to Hill and others, he failed to satisfy his debt. That executions on the judgments had before the justice, was promptly levied on two of the negroes in the deed, and 2 horses, and were sold by the officer, and purchased by the grantees of the fraudulent deed by their agent, having depreciated the sale by forbidding it, setting up their adverse claims, and threatening suits against the purchasers, making a fraudulent speculation in it. That the grantees subsequently sold the property thus acquired, and the other property in the trust deed; your orator setting up a claim to be satisfied, his execution, and giving notice thereof; that the whole of said property was worth \$2200. He charges the debt secured by the deed fictitious and pretended, and where otherwise is incorrectly represented and overstated; that the deed is void in fact and law as to his claim, and unknown and unaccepted, until he had asserted his claim by execution. He makes the parties in the deed, and purchasers of the property parties, calls for answers and relief.

The answers of the defendants admit the deed of conveyance of the trust property, by Haines to them of his property, and of his having none other to pay complainant's debt, after the sale of the land, admit his judgment and the judgments by other creditors named; admit the possession by them, and sale of the property by them for their use under the deed; and admit an application of \$160 to a debt of one of the defendants, Thomas Miller, not secured in the deed. They allege that the debts secured by the deed were real bona fide debts; that the deed was made and delivered to the clerk, and its after acceptance as legal and valid; that all sales made were fairly made and at full prices for the property. That there was no combination to procure the contracts or secure the property, and no fraudulent intent against complainant as a creditor or any other, but the intent of the maker was honest and bona fide, and they accepted in good faith to pay their honest debts upon application. The cause was heard, and upon a decree made dismissing complainant's bill, and the complainant filing his bill of exceptions confirming the evidence, on hearing which was allowed, appealed to the supreme court to reverse the decree of dismissal.

The complainant gave evidence of the suit by him against Haines, in which he obtained judgment of the deed of record of 8th April, 1842, by which he conveyed to outstanding creditors all his personal property subject to debts; also of seven judgments obtained before justice of the peace on 8th of April, 1842, of about \$378 90, also of judgments of the 9th of April in favor of two creditors to amount of \$33 52, also on the 15th another judgment amount of \$8 00, before justices, against the debtor Haines. That Haines appeared personally before the justice on the 8th of April, and left the court before the judgments were all entered and executions issued, that the justice finished the executions and delivered them to the officer at one o'clock in the night of that day. All these executions of the 8th, 9th and 15th, were returned satisfied on the 27th of April. It was proven by two witnesses that Haines had stated to them, that complainant was a generous creditor, and that the money due him was for a loan of money at ten per cent. interest. It was proven that the same officer had, on the 8th, two executions from a justice's court for about \$57 against Haines, and called on Haines, and Wesley Hill being present, and requested of Haines a list of property to levy them on. He promised to do so, and starting off with Hill, said he would soon return back to do it. He not returning, the officer went in search of him, and found him and Hill, in Mr. Sargeant's law office in Paris where Sargeant was writing. The doors were locked, and the windows blinded, and I left them at eleven o'clock at night. The creditors then required of the officer to go to Haines' house, two miles from Paris; and the officer was informed that Wesley Hill had gone towards Haines'. He proceeded to Haines' in the night, and found the negroes and horses taken and carried away. It was proven that Hill left Paris by Haines' direction, before the deed was closed; that he proceeded to Haines', took all the negroes and two horses, and carried them

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over in the night time to Audrain county to a Mr. Perry's, where he left them. Haines living in Monroe county, some three miles off; that Perry lived in a sparsely settled country, and the road difficult to find, a south course from Haines', and Hill lived in Monroe county, eleven miles north east from Haines'. The officer had obtained all the executions on the judgment of the 8th, and with those two of elder date he went late at night from Paris to Haines' after the property. In the morning he made pursuit of Hill with the property, and meeting Hill on the way returning from Perry's, ascertained that he had taken them, and he claimed them under the deed from Haines. The constable proceeded, and seized two boys, slaves and horses. A trial was had of the right, a decision made in favor of the executions; a sale was had, and Mr. Gentry bid off the negroes at \$420; and also the horses. The sale being forbid by Wesley Hill, who claimed the property as conveyed to him and others to secure debts, the whole of the executions in his hands were satisfied by these sales to upwards of five hundred dollars.

After the levy by the constable, a young man in the employ of Haines, who had with Hill brought the negroes to Perry's, carried the other two negroes back to Haines'. A few days after, they were brought back to Perry's by Haines for four or five days, until two of the persons, grantees in the trust deed, came and carried them away by Haines' order. The worth of the two negroes (boys) upon execution sale was about \$600. It was proven that Haines said after the deed was made, that he had made it, not to prevent the payment of his debts, but to prevent a sacrifice of his property by his creditors; that he thought the parties in the deed would allow him to keep the property until he could raise produce and pay his debts, and thus save his property; that his intention was to keep off his creditors until he could make the money and pay them. This conversation was procured to be had by the complainant with Haines. Hill when he brought the negroes to Perry's, told Mr. Perry, that they had broke on Haines and that he wished to save himself; and Haines also said in his presence that he did not intend to wrong his creditors; he requested Mr. Perry to let the negroes stay at his house; for if the deed was broken, Majors, (the complainant) would take them, and he thought his friends would let him have the negroes, and he and they could sell them for better prices. The negroes and horses in August 1842 were sold by Thomas Miller for the grantees and creditors in the deed; at which sale Majors, the complainant, stated the nature of his claim by his judgment, and forbid the sale, and claimed the property as subject to his debt; the sale was had under the deed of all the property. It was proven that at the constable's sale in April 1842, that Thomas Miller observed to one bidder that he would buy a law suit; the bidder saying that he wanted a good bargain, ceased to bid. The remark seemed to the witnesses as jocular, but not so by another. It was proven that O. P. Gentry purchased in the property in April at constable's sale, giving a little over \$400 for the two negroes, Jackson and Henry, and a trifle for two horses; that this was an arrangement between some creditors in the deed of which Gentry was one, that he should bid off the property in name of Thomas Miller, at whatever prices it sold: they were to give notes at twelve months, at ten per cent. for \$537, the amount of the executions. For the amount of these executions, Gentry let Miller, Hill, and Jno. R. Smith, creditors in the trust, the two negroes he had bought, and they to pay of the executions. It was arranged that Thomas Miller having a debt of \$160, not secured in the deed, he was to share it in the fund in proportion to \$1200, the assumed indebtedness and security of the deed. That all the property was subsequently to be sold for cash, those paying the executions, reimbursed their money, and the residue be applied to pay their claims. It was proved by the constable, that at his sale, he sold the two negroes to Gentry for \$500. He says one 18 or 19 years old, and was worth \$500; and the other \$400.

It was proven that Haines had no property after the sale of his land to pay Majors, (the complainant's) debt, except the property claimed by the parties and embraced in the deed spoken of. It was proven that Haines brought into the clerk's office two hours after midnight, on the 8th of April 1842, the deed to Hill and others. He came alone and acknowledged it, and it remained some two weeks there.

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For defendants, it was proved that the land of Haines, sold under Major's (the complainant's) execution, was worth \$500, and the negroes mortgaged some \$1600. That the valued assessment of Haines' land by the assessor had been \$775. It was proven by the clerk of the county court, that Haines was liable to the county for a considerable amount, for which some of the mortgages were security, and those debts were cancelled and paid by those mortgagees. That the sale by the grantees of the property was public, and notice generally given by advertisement.

That Thomas Miller was the acting trustee, and that he had collected and paid over the whole amount of the debts secured to the creditors by the deed, and also a further sum to said Thomas J. Miller, not secured by the deed. It was proven that at the rendition of the judgments on the 8th of April 1842, Wesley Hill was present, and seemed very anxious that Haines should make him secure for debts he was bound as his security, and that Snell, Caldwell, and other creditors expressed to Haines their opinion that he ought to secure him and his other securities; and Haines seemed to show some reluctance. It was proven that at the date of Major's judgment and after Haines was considered in failing circumstances, that at the time of the sale of Haines' land under Major's execution, Gentry and Miller, bid for the land; that about thirty acres improved, and the house was on Congress land; that Major's purchased, but he did not want the land.

This was all the evidence given by either party. The complainant after decree, prayed an appeal to this court, which was granted, and he seeks a reversal of the decree.

### **Todd for appellant.**

1st. That the deed was made secretly.

2nd. That the consideration was inadequate, and the whole property, owned by the debtor was conveyed by it.

3d. That the acts of Hill for the creditors in trust, was fraudulent, secret, and his removal of the property evidence fully of fraud; and for his acts they are responsible.

4th. The declarations of the grantor and Hill, relative to the object, is conclusive to prove fraud; it was to save the property from sacrifice. They were to assist Haines in selling the property, and to debar creditors from levying on it.

5th. That the property conveyed remained in possession of the debtor. See authorities 1 J. C. R. 482; 7 Mo. Rep. 245; 5 Mo. Rep. 484; 4 Bibb 466.

### **Kirtley for appellees.**

1st. I rely that the decree is right, and cannot be reversed in this court, upon the evidence in the record.

2nd. The facts being found by the court, and no motion for a new trial, this court cannot now reverse the decision. See 4 Mo. R. 456, *Swearingen vs. Newman's Adm'r.*; 4 Mo. R. 623, *Cook vs. Davis*; 11 Mo. Rep. 623, *Rhodes vs. White*.

### **Judge BIRCH delivered the opinion of the court.**

We perceive nothing in the record of this case sufficient to fix a fraudulent intention upon any of the parties to the conveyance of the 9th of April, 1842. As the law stands, a debtor has the right thus to discriminate amongst his creditors, and that is the utmost which is apparent upon the face of the conveyance and from an analysis of all the testimony which was taken with a view to elucidate the transaction.

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Under the circumstances presented, the delivery of the conveyance for record was substantially a delivery by A. to B. for the use of C. and is sanctioned by the earliest authorities. 3 Coke, 27. 1 Shep. Touch, 58. It cannot, therefore, be regarded otherwise than as having pledged the property thereby transferred, and placed in the possession of one of the beneficiaries in the trust, to the uses designated, and that such an arrangement was valid unless disclaimed or disaffirmed within a reasonable period by some act of the mortgagor. That is so far from being pretended here, that the contrary impliedly appears in the seasonable (however invalid) arrangement they entered into with a view to discharge the prior incumbrances of the justices executions.

The only question, therefore, upon which we find ourselves in disagreement with the court below, has relation to the sum which it appears from the testimony was retained by Miller out of the proceeds of the sale of the property, on account of a judgment debt due to himself, but not included in the mortgage or otherwise carried to the dignity of a lien, as the complainant's was, by execution. To this sum, or to whatever amount was ultimately realised from the sale of the mortgaged property, over and above the debts secured by the justices judgments and the mortgage deed, and not exceeding the debt remaining due to the complainant, it would seem that in virtue of his execution, and the continuous and open claim which he set up under it, he was equitably entitled. This, of course, presupposes, that the arrangement and conduct of Miller, and of Hill imparts too much the appearance of unfairness, if not collusiveness, to the sale by the constable, to permit it to stand against the rights of meritorious third persons.

The circuit court erred in dismissing the bill of the complainant, instead of ascertaining the net excess of proceeds which came to the hands of Miller, who seems to have acted as a kind of agent or trustee under the deed, and decreeing the complainant, the payment of that sum, with interest, as so much upon his judgment against Haines.

Its decree is therefore reversed, and one will be here entered in conformity with the foregoing opinion.

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NATHAN AYRES vs. HERVEY H. HAYES.

## NATHAN AYRES vs. HERVEY H. HAYES.

1. Defendant covenanted with plaintiff to pay him eighteen dollars and fifty cents per acre for a tract of land within *specified boundaries*, supposed to contain two hundred and forty-two acres, *more or less*. Held, that defendant was not bound to pay the specified price per acre for two hundred and forty-two acres, but for the number of acres included in the specified boundaries.
2. A covenant to pay one hundred dollars in *current bank notes or such as pass in Missouri*, may be discharged by paying or tendering that *amount* in such bank notes as were passing in Missouri at the time of payment, without any discount in common transactions of buying and selling; and upon failure to pay the debt when due, the covenantor does not become liable to pay one hundred dollars in gold or silver, but only the specie value of that amount of current bank notes or such as pass in Missouri with the stipulated interest thereon.
3. A bond or note for the payment of a sum of money on a specified future day, "*with eight per cent interest*," does not bear interest until the debt becomes due.

## ERROR TO MARION CIRCUIT COURT.

## VANSWEARINGEN for plaintiff in error.

1st. The circuit court erred in refusing to exclude from the consideration of the jury, the covenant introduced in evidence which differs in substance, and essentially from the covenant declared on.

2nd. The court erred in refusing to permit the defendant to prove the admission of the plaintiff, "that he could not make a title to the tract of land sold, even if the defendant paid him the purchase money when due. If on account of want of title—defective title or existing incumbrances—or from any other cause, the plaintiff could not make title, and such fact was admitted by plaintiff to defendant or his agent, the defendant could not be compelled by law to perform the agreement on his part, by payment of the purchase money. 11 Johnson's Reports, page 527; 1 Snyder on Vendors, page 5, top.

3rd. The court erred in rejecting the testimony offered by defendant, to prove a deficiency in the quantity of land sold. The words "more or less" in the covenant are mere words of description, and even if not so regarded, are restrained by that clause of the covenant, under which the land was sold at \$18 50-100 *ls per acre*. Which last clause of the agreement required the vendor to have the land surveyed after the first payment of purchase money by vendee. Hill vs. Buckley, 17 V. page 394; Man and Tolls vs. Pearson, 2 Johnson Reports, page 37.

4. The court erred in rejecting the testimony offered by defendant to prove who held possession of the land in 1841; subsequent to the time at which the plaintiff was bound by covenant to give the defendant possession; and to prove also, that the plaintiff had failed to comply with the essential part of the covenant; in that he did give defendant possession on the 1st day of April, 1841.

5. The court erred in rejecting testimony to prove the set off, pleaded by the defendant in the cause; which set off, when proved would be regarded as legal payment of portion of the purchase money.

6. The court erred in rejecting testimony offered by defendant, to prove that the plaintiff received the first payment for the land sold, in Kentucky bank paper, without complaint or objection.



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7. The court erred in conversing with the jury, about finding their verdict, and by subsequent interference with said verdict. The court had no legal right to direct the clerk to enter a verdict different in substance or exceeding in amount of damages the verdict rendered by the jury, or to render a judgment not corresponding with the verdict of the jury. Dunlaps practice vol. 2, page 651.

8. The court erred in giving to the jury the 2nd instruction asked by plaintiff, as there was no evidence tending to show "that the plaintiff was pressed or embarrassed in his circumstances." This instruction was calculated in the absence of testimony, to establish such fact not only to embarrass the cause, but to mislead the jury, and to divert their minds from the true points in issue.

9. The court erred in giving the 3rd instruction asked by plaintiff, for the same reasons assigned against giving the 2d instruction.

10. There was manifest error in the courts granting the 4th instruction asked by plaintiff. The words in the agreement setting forth the kind of funds in which purchase money was to be paid, call for *current bank notes or such as pass in Missouri*. And yet the court instructed the jury that the defendant was bound to pay to the plaintiff \$18 50 per acre for the land sold, in Missouri bank paper or the value thereof. Farwell & c. vs. Kennett & Co., 7th vol. Mo. Rep. page 595.

11. The court erred in granting the 5th instruction asked by plaintiff, in this: "that the defendant was to take the tract of land at 242 acres, whether it contained "more or less" than that quantity". This instruction was clearly wrong for reasons stated under the 3rd head.

12. The court erred in giving the 6th instruction asked by plaintiff, in this: that the instalments named in the covenants sued on, should draw interest at the rate of 8 per cent. per annum from date of covenant, if not paid at maturity. The terms of the covenant clearly show that the instalments referred to were only to bear interest from their maturity, and not from date of the covenant. See covenant.

13. Before the plaintiff is entitled to sue, or can sue, for an alleged breach of the covenant, he must aver in his declaration a full compliance with the stipulations on his part in the agreement, and make proof thereof.

14. The court erred in refusing the second instruction asked by defendant. The plaintiff covenanted with the defendant to have a survey of the tract made after payment of the 1st instalment, and also to give a title bond to defendant for the same at that time for the land in question. These covenants were dependant and should have been complied with on the part of the plaintiff before he could legally require the defendant to pay the second instalment of purchase money. The survey was indispensable, in order to ascertain the amount of second instalment, as the land was sold at a specified price per acre, and the only object of the survey was to determine the quantity of the land, in which way only could the amount of the 2d instalment be ascertained. Leigh's nisi prius, vol. 1st, pages 678, 679.

15. The court erred in refusing the third instruction asked by defendant, for the reasons assigned against the refusal of the 2d instructions.

16. The court erred in giving the instruction contained in the record, at its own instance, and without motion from either party. Farwell vs. Kennett.

## GLOVER &amp; CAMPBELL for defendant.

1. The legal effect of the covenant, is that the payment may be made in bank notes which pass in Missouri; but the value of the notes offered in payment must equal the value of the number of dollars due for the land; that is, the number of paper dollars offered, must be sufficient to equal in value gold or silver.

The effect of the covenant sued on, is to fix the number of acres in the tract at two hundred and forty-two; and the survey was for other purposes, fixing metes, bounds, &c.

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3. The covenant drew interest at eight per cent until paid from date.
4. The failure of Hays to perform his covenant was no bar to his action.
5. That if Hays agreed to allow a premium on specie, in order to collect the whole debt due him, and Ayres did not pay the whole, he was not bound by the agreement.
6. The deed to Ayres was never delivered, and proved nothing if it had been.
7. There is no reasonable objection to the conduct of the court in receiving or entering the verdict.

RYLAND, Judge, delivered the opinion of the court:

Hervey H. Hayes, the defendant in error, brought his action of covenant against Nathan Ayres the present plaintiff in error, in the Marion circuit court, at the August term thereof, in the year 1846. The defendant below filed his plea of covenants performed, with an agreement by the counsel of both parties, that the defendant might give in evidence, any thing, that he could plead specially in defence.

At the August term of said court in the year 1847, the plaintiff filed his amended declaration, and the defendant then filed his demurrer thereto, which he afterwards withdrew, and filed his "statutory plea" of general issue. The case was regularly continued until August term, 1848, when it was tried, and a verdict was found for the plaintiff below. The defendant then filed his motion to arrest the judgment, which was overruled, and excepted to. Also his motion for a new trial, which was likewise overruled and excepted to.

In order to a proper understanding of the matters in controversy, I have thought it best to insert the material facts of the case, which were given in evidence in the court below.

The following is the evidence in this case as preserved by the bill of exceptions, which is thought any wise material to the decision hereof, by the court. "Article of agreement made this 16th day of September, 1840, between Hervey H. Hayes of the county of Marion, State of Missouri, of the one part, and Nathan Ayres, of the other part, county of Woodford and State of Kentucky, witnesses, that the said Hayes has sold to said Ayres, his farm, now in his possession, in Marion county, and State of Missouri, known as a part of the lower Marion college tract, and bounded as follows: (viz.) beginning at a stake at the north west corner of said farm, on the Hannibal road, and running due south, by the lands of Messrs. Caldwell, Dallas, Heissenger and Dr. Ely, to a sod fence along the land of T. L. Anderson, to Mr. Philemon Hunt's land. Thence north 294 poles to the Hannibal road, thence west about 130 poles to the beginning, supposed to contain two hundred and forty-

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two acres, be the same more or less, with all the houses, tenements and appurtenances thereto belonging, and in any wise appertaining: and is to give said Ayres, possession of the above named land, on the 1st day of April, 1841, and if said Ayres should wish to make improvements on the premises in November, and through the winter, he can use one or two of the cottages for his hands to live in, until the 1st of April, above mentioned: and the said Ayres on his part engages to pay to the said Hayes the sum of eighteen dollars and fifty cents per acre for said land, in the following manner, viz: one half of the amount on the 1st day of November next, and the balance on the 1st day of November, 1841, with eight per cent interest. The payments to be made in *current bank notes, or such as pass in Missouri*. The said Hayes agrees to have the land surveyed when the first payment is made, and give his bond for a warrantee deed to said Ayres at that time—on the second payment being made, a general warrantee deed will be required. As witness the contracting parties have hereunto subscribed their hands and seals, the day and date above written.

H. H. HAYES. [SEAL.]

NATHAN AYRES. [SEAL.]

ATTEST, E. RICHMOND.

The defendant then read in evidence two receipts, as follows: "Received of Mr. John W. Ayres, agent for his brother Nathan Ayres, fifteen hundred and eighty-four dollars and forty cents, in part payment for a farm, at the lower college, which I sold to Nathan Ayres last fall, this 9th day of December, 1840.

HERVEY H. HAYES."

"Received of Mr. Nathan Ayres, seven hundred and ten dollars, twenty-two cents principal and interest in full, on the first payment for my farm, which was to be paid for, in two equal payments as specified by our written contract, of which the said Ayres and myself hold copies this 19th Oct., 1841.

H. H. HAYES."

Peter Sowers, was then introduced as a witness, and sworn, he stated some time in February, 1842, Nathan Ayres got from him in Palmyra, two thousand dollars in specie, or what was equal to specie, as it was a check on the bank of Missouri for specie; that Ayres gave him for this check, a check on one of the Kentucky banks, which was worth then as much as Kentucky bank notes, he, Sowers, having sold it for Kentucky paper, at the amount called for on the face of the check; Ayres gave witness a premium of twelve per cent for the two thousand dollars in specie then obtained from him; Kentucky bank paper was received by him at his store at the time, and also in payment of debts in business transactions generally as he believes, but did not know, though when

exchanged for specie or specie funds, the latter commanded a premium of 12 per cent. Witness also said that the bank paper in circulation in Missouri, was about this time of different relative values in the market as compared with specie.

John M. Ayres then introduced by defendant says he is a brother of defendant, and since this suit was brought, he went to see plaintiff, for the purpose of trying to compromise this suit; Hayes admitted that Nathan Ayres came to him at a time, when his, Hayes' property was about to be sold, and offered him the specie, if he would make a deduction of twelve per cent; the premium which he, Ayres, had to pay Sowers for specie; which Hayes agreed to accept, if he Ayres, would pay all that was due him, but Ayres did not pay all, and as his, Hayes' circumstances at that time compelled him to take the specie, he will not now make that allowance. The time of paying the \$2000 alluded to in the foregoing evidence of John M. Ayres, was 11th January, 1842, admitted in court by both parties. The defendant offered to prove by said witness, John M. Ayres, that at the time he made the first payment to Hayes for the land, that the payment was made in Kentucky paper, and not in specie or specie funds, and that Hayes made no complaint or objection, but received the Kentucky paper. To this the plaintiff objected—court sustained the objection—defendant excepted to the opinion of the court. The defendant then offered to prove by John Nichols the quantity of land there is in the tract in controversy, sold to Ayres, by the plaintiff, but the plaintiff objected—court sustained the objection, and defendant excepted. The defendant then offered to read a deed from Hayes and wife, to Ayres with the certificates thereon; but plaintiff objected—court sustained the objection, and defendant excepted. The plaintiff then read in evidence, a letter from Nathan Ayres the defendant, to plaintiff, as follows:

HANNIBAL, Feb. 12th 1842.

Mr. HAYES:—After I saw you yesterday, I was informed that a boat was up the river, and would be here early this morning, and as I had been disappointed in not finding my deed on record, I thought I would get it and have it attended to. I therefore called on your wife for it, on my way home, but find the deed will not do: in the first place, the sum paid is left blank; in the next, the deed only specifies the length of one line. I wish you to execute another deed according to the last survey, which you showed and instead of running to such a fence, I wish it to specify how much of the fence it includes, as you know the improvements were separately considered in our bargain. I also wish to

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specify the sum paid, including what is due, and I hereby pledge myself to attend to that matter as soon as I return, which I hope, will not exceed five weeks; you know this title and deed business has been quite perplexing, and I for one, wish to have all settled, as far as regards my interest. I have sacrificed too much to be put off any longer. Joel Richmond will present this and the deed; and if you please, attend to it forthwith. I think the section, range and township, should be also mentioned, as there are so many contending powers, these days one cannot be too particular.

Yours,

NATHAN HAYES."

After this letter was read, the deed which the defendant offered to read, was then read without any objection. The defendant offered to prove who had the farm in possession after 1st April, 1841, but the court rejected the evidence on motion, and exception was taken.

This is all the evidence, that is thought in any wise material to the proper decision of this case.

The plaintiff asked the following instructions, which were given by the court, and to which the defendant excepted.

1st. If the plaintiff to induce the defendant to pay him, after the debt was due, agreed with the defendant, without any consideration to accept a part of his debt in discharge of the whole, such agreement is not binding on the plaintiff.

2. If the plaintiff at the time of the payment, by the defendant of the \$2000, in Missouri paper, was straightened for money, and the debt of the defendant to the plaintiff was then due, and under the pressure of his circumstances, promised the defendant by way of inducing him to pay said debt, to allow him a premium thereon, this is such oppression upon the plaintiff as makes the promise to allow the premium void. If the debt was due from defendant to the plaintiff, it was the duty of the defendant to pay the debt, without any reward from the plaintiff.

3. And that if the plaintiff did agree with the defendant, to allow him a premium under the circumstances named in the 2d instruction as therein stated upon full payment and the defendant did not and would not pay the balance due, the plaintiff was not bound to allow said premium.

4. The plaintiff moves the court to instruct the jury that the legal effect of the covenant sued on (if they find it to be the act of the defendant) is to bind the defendant, to pay to the plaintiff \$18 50-100 per acre for the land named therein in Missouri bank paper or the value thereof.



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5. That the legal effect of said covenant (if made by defendant) is that Ayres was to take the tract of land named therein at 242 acres, whether the same contained more or less than that quantity.

6. That the installments named in the covenant sued on (if they find it was made by Ayres) draw interest at 8 per cent from the date of the covenant, if not paid at maturity.

There is no necessity to notice the instructions asked for and refused on the part of the defendant.

The jury returned into court and said by their foreman. "We do not understand the instructions given us by the court." The court then asked the foreman—if the jury wanted any explanations or further instructions? The foreman answered "yes" "as to the effect of the contract." The court then without any motion from either party gave the following instruction.

**Hays vs. Ayres.** At the request of the jury for further instruction as to the construction of the covenant sued on and given in evidence the court gives the following:

"That the complainant Hayes had a right to demand payment for 242 acres at \$18½ per acre in cash, at any time, after the respective days of payment agreed on had expired. The clause inserted in said covenant allowing the amount to be made in bank paper, was for the benefit of the defendant Ayres, and if he did not avail himself of it at the time, the respective payments became due, he lost it, and Hayes had a right to demand specie. The court further says, that if Ayres had presented bank paper of the kind mentioned in the contract, on the day said payment became due, Hayes was bound to take them only at their cash value." This was objected to by defendant and properly saved by bill of exceptions. The jury then retired and afterwards returned the following verdict. "We, the jury, find for plaintiff by instructions from the court—damages \$470,78 due 1st January 1842, J. D. Dowling, foreman".

The court then ordered the clerk to calculate the interest on the amount found due, from the time, due till the trial at 8 per cent and enter the verdict of the jury in proper form as follows. "We the jury find for the plaintiff and assess his damages to seven hundred and nineteen dollars and eighty six cents," to which judgment of the court the defendant excepts. The defendant afterwards moved in arrest of judgment, which motion was overruled. He also moved for a new trial—which motion was overruled—the defendant excepted to the overruling of both of said motions and brings the case before this court by writ of

error.



From the foregoing statement it becomes apparent, that the principal points for adjudication involve the construction of the instrument, sued on as the covenant between the parties. I will therefore notice this instrument in three of its most important features.

1st. The quantity and price of the land sold.

2d. The medium of payment.

3d. The interest and time of its computation.

These points are involved in the instructions given by the court to the jury and their propriety must be tested by the legitimate construction of the said covenant.

And First. As to the quantity of the land sold and price. Let us look to the words of the covenant—"said Hayes has sold to said Ayres his farm now in his possession, in Marion county, State of Missouri, known as a part of the lower Marion college tract, and bounded as follows, (viz.) Beginning at a stake, at the north west corner of said farm on the Hannibal road, running due south by the lands of Messrs. Caldwell, Dallas, Heissenger and Dr. Ely to a sod fence, thence east, by the fence along the land of T. L. Anderson, to Mr. Philemon Hunt's land. Thence north 294 poles to Hannibal road, thence west about 130 poles to the 1st mentioned stake on the Hannibal road, supposed to contain two hundred and forty acres be the same more or less, with all the houses, tenements and appurtenances thereunto belonging &c. And the said Ayres on his part engages to pay to said Hayes the sum of eighteen dollars and fifty cents per acre for said land." "Said Hayes agrees to have the land surveyed when the first payment is made" Here is not a selling of a farm or tract of land for a round sum of money—but a tract of land within specified boundaries and the last line of which is not very certain, being "about 130 poles" supposed to contain two hundred and forty acres more or less—now these words "more or less" do not make the exact quantity sold to be so many acres, but their object is to express the intention of the contracting parties to be for the entire land contained within the marked boundaries, whether the quantity shall be more or less than 242 acres. The "farm" as marked out by the boundaries supposed to contain 242 acres was sold and the words "more or less" were added so that if there be more than the estimated quantity, it was nevertheless sold and if less than the estimated quantity it was still a contract.

Now if this land thus supposed to contain a certain quantity of acres more or less had been sold for a sum of money, say for example for four thousand dollars, without naming any price per acre, and upon ac-

tual survey, it should be found to contain less than the estimated quantity, that could afford no cause of complaint to the purchaser; for he bought the entire tract for the entire sum—and if he guessed wrong, as to the number of acres, it is his misfortune or his fault. But in this contract the parties guard against this event, for they mark out the boundaries and they suppose the quantity contained therein, to be so much, more or less—whether more or less, the tract as bounded is the one sold; and the manner of estimating the amount of the consideration, is per acre. In my opinion therefore the purchaser Ayres, according to the legal effect of the covenant is not bound to pay for the quantity of 242 acres at all events, at \$18 50-100 per acre; but is bound to pay for the quantity included, in the specified boundaries, whether that quantity be 242 acres or be more or less at the agreed price per acre, and that the plaintiff must rely upon his surveying the land within those boundaries in order to ascertain his demand against the defendant.

The second point. The medium of payment. "One half of the amount to be paid on 1st of November next and the balance on the 1st of November eighteen hundred and forty one, with eight per cent interest. *The payments to be made in current bank notes or such as pass in Missouri.* This covenant was made in September in the year 1840 and the first payment was made on the 1st day of November 1840. What is the meaning of the words, "current bank notes or such as pass in Missouri?" What did the contracting parties understand by these words? Did they mean gold or silver or notes of the Bank of the State of Missouri. I suppose there is scarcely a man to be found, who was at all familiar with monetary affairs, at all conversant with pecuniary matters as they were known to exist in 1840, that will answer this last question in the affirmative. I have no doubt, that the parties understood this contract to be such as permitted Ayres to pay for the land in any bank paper, that was passing at the time in Missouri, without discount in ordinary transactions of life. In the case of *Farwell and als. vs. Kennett and als.* 7. Mo. 595, it was stated by this court, to be a principle universally admitted "that the expressions of contracting parties must be taken according to their popular meaning." It was also admitted that "the courts will judicially take notice in what light, the medium or subject matter of payment of a note or bill is regarded in common understanding." From the principles laid down and admitted by this court, in the above cited case of *Farwell et als. vs. Kennett et als.* I come to the conclusion that the medium of payment was adopted in this contract by the parties, "with an express view to prevent a demand

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for cash or specie." If this had not been the understanding, such would not have been the terms used. It was easier to write the word "dollars" than to write the words "current bank notes or such as pass in Missouri." The construction, therefore, that I give this covenant, is that Ayres was to pay the amount for the land in current bank notes. If he therefore tendered the amount in such bank notes as were passing in Missouri at the time, without any discount in common transactions of buying and selling, it would have been good. But if he failed to pay the amount due at the time, then he became liable to Hayes for the amount in current bank notes or such as pass in Missouri, the value of which amount of notes, in specie would be the damages to be ascertained by a jury, with the stipulated interest thereon. This case now before the court is not distinguishable in principle from that cited above—but is widely different from the case of Cockrill vs. Kirkpatrick 9 Mo. 697 which needs only to be read to be observed at once.

The third point—the interest and the time of computation. I have considerable doubt upon this point—"one half of the amount (we see it was not yet ascertained; which shows they did not then count the number of acres at 242) to be paid on 1st November next; and the balance on 1st November 1841, with eight per cent interest." When was the interest to be computed? From the date of the covenant? Or on the amount after maturity? From the instruction given by the court below to the jury, it seemed to be the impression of that court, that if the amount was paid when due, it bore no interest, but if not paid at maturity, it did bear interest from the date of the covenant. This instruction was wrong, the covenant has no such condition in it. The balance to be paid on the 1st November 1841, was to be with interest from date, or no interest could be counted until after maturity. The interest did not depend upon the payment on the day, or the parties would have said so in their covenant.

I come to the conclusion that the interest should be counted for from the time the money became due, I confess though, I have considerable doubt. My brother Birch, concurring the judgment below will be reversed, and the cause remanded.

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JOHN O'FALLON & TRUSTEN POLK vs. JAMES TUCKER.

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**JOHN O'FALLON & TRUSTEN POLK vs. JAMES TUCKER.**

Where a trustee is authorized by the deed of trust to appoint agents or substitutes to assist in the management of the trust business, and he accepts the trust upon the express condition that he shall not be responsible for the negligence or malfeasance of any person except himself, should an agent or substitute appointed by him be guilty of malfeasance, a court of chancery will not hold him liable.

**APPEAL FROM ST. LOUIS CIRCUIT COURT****STATEMENT OF THE CASE.**

Tucker brought his bill in chancery against O'Fallon & Polk, alleging that Philander Salisbury and John Riggins made, by deed and assignment of their property, dated 1st March, 1840, to John O'Fallon and Trusten Polk, trustees for the benefit of their creditors, whereby they transferred to said trustees, all their personal and real property, and choses in action, and effects and stocks, debts, &c., in trust, to collect all debts, and sell and dispose of the property and effects in the manner deemed by them most advantageous, on credit or for cash, at public or private sale, and out of the proceeds to pay the expenses, and then to retain commissions for their services, the balance being net proceeds to apply first in payment of the creditors in full, named in the schedule No. 1, and the balance, if any, to apply in payment of the creditors named in schedule No. 2; and after they were paid in full, to apply the remainder in payment of the creditors named in schedule No. 3, and if any thing should be left, to return it to the said Salisbury and Riggins. The said Salisbury and Riggins then, by the same deed, empowered said O'Fallon & Polk, as their lawful attorneys, to appoint substitutes with full authority to act in the name of Salisbury and Riggins, to do all acts and things necessary or proper for carrying said assignment into effect.

The trustees covenant to perform and fulfil the trust according to the deed. Then comes the following covenant or provision: "and the parties hereto also agree that the said parties of the second part shall not at any time be held responsible for any greater amount of money or property than shall have been by them actually received, nor for the negligence nor malfeasance of any other persons than themselves; but they shall only be responsible for their own acts and negligence in the premises." The trustees were also authorized to arbitrate or compromise all the assigned claims at their discretion. The bill then alleged that the trustees had violated their trust by paying out the trust funds to creditors of the second and third schedules or classes, leaving the complainants demands, which was in the first class, amounted to \$106 57, being three drafts in favor of Holman and Axtell, unpaid, except a per centage of 20 per cent thereon; that there were funds sufficient for the payment of the first class in full, and prays that the trustees may render an account and pay the balance due to complainants, &c.

The answer of the defendants, O'Fallon & Polk, set forth that they were induced by the earnest solicitations of Salisbury and Riggins to act as trustees; that they repeatedly refused to act, for the reason that they were both much occupied in their own business, and were not merchants; and that the said Salisbury and Riggins had been long engaged in mercantile business, and that their affairs were complicated, and that should they accept the trust, they would necessarily be compelled to employ many agents and attorneys in the settlement of the concern; nor would they consent until it was agreed that they should not be responsible for money or property not actually received by them, nor be held responsible for the negligence or malfeasance of any other persons than themselves; that with this understanding they accepted the trust; and on full deliberation, they considered it best for all concerned to keep open the store of said Salisbury & Riggins for a few weeks, and sell at private sale the bulk

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of the stock: and they appointed for that purpose said Salisbury & Riggin their attorneys in fact, and employed divers clerks and agents, but put the chief control and management into the hands of said Salisbury, in whom they then and ever since reposed implicit confidence, and who, as they supposed, would be more acceptable to the creditors than any other person. The defendants further alleged that the bills receivable and choses in action assigned, proved, in a great measure, valueless, and the funds for many causes was much less than was expected, and alleged that they were not insurers of the fidelity and skilful management of their said agents and attorneys, but that as soon as they heard that said Salisbury had applied any of said funds on the second or third classes before those of the first were paid in full; they promptly interposed, and took all the assets into their own hands, and dispensed with the further services of their said attorneys; that the division of the funds, partially, by said Salisbury to the second and third class of debts was made by said Salisbury in good faith, he thinking he was doing the best for the benefit of all the creditors, and that the assets would pay all the debts. The answer denies the equity of the bill, and states with its schedules the whole dispositions of the assets and application of the proceeds, and value thereof, &c. A replication was filed, and the cause was tried, and a decree made that the trustees had not duly and properly applied the money realized from the assigned assets, but neglected to execute the trust correctly, and failed to pay what was rightfully applicable to complainants debt, and that they should account for all the assets, and state the manner in which they had been disposed of and applied, and what remained on hands, &c., and appointed a commissioner to take the account.

On the hearing, the answer of the defendants was admitted by the complainant's counsel to be true, and was read in evidence.

The said Philander Salisbury was the principal witness for the complainants, and stated that the assignees gave him charge of the assigned funds and effects, with power to dispose of them according to the deed; that after the assignment he thought that the effects assigned would pay all the debts of all the three classes, and accordingly wrote so to some of the creditors to send on and receive their debts in goods; and that some of them did come and receive goods and Illinois scrip to the amount of \$5000 or \$6000 nominally. A few days after that, defendant O'Fallon came to him, Salisbury, at the store, and with some warmth told witness that it must not be done again; that no more payments must be made to creditors of the second and third classes; and that nothing further was ever applied on them; that their payments were not made with the knowledge or by direction of the assignees, nor did the assignees know of the said propositions made to the creditors as aforesaid; that he wrote to said creditors without consulting the assignees; that all the payments to the second and third class creditors were made all at the same time, within four or five days of each other; that he had an indistinct recollection that he met Polk in the street and said either that he would write or that he had written to the creditors to come and take goods, and dont remember that Polk said any thing, if he ever had such conversation, and could not say whether Polk understood him or not, that as agent of assignees he was required to make to them monthly returns of what was done, that those returns did not contain the payments in goods and scrip which were the payments made to the second and third class creditors. The deed of assignment and schedule were given in evidence; and there was no other testimony on the hearing.

The commissioners report was afterwards filed, to which exceptions were in due time taken by defendants, which were overruled by the court, and a final decree was made against the defendants based on said report, requiring them to pay the complainants \$205 03.

Said exceptions to the report, were as follows:

1st. That commissioner did not state correctly the true amount of debts of the first class, on 7th December 1846, to which date he calculated interest or should have done so.

2nd. That in stating the amounts of the debts of the first class, which were first to be paid, the aggregate of them, being about \$32,000, the commissioner did not calculate interest on any of those demands of the first class, which had been paid in full by the trustees.



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3d. That the per centage reported by the commissioner to be paid on the demands of the first class was too large.

4th. Commissioner erred in charging the defendants with the Illinois scrip at fifty cents to the dollar, instead of ascertaining the value of these goods which the agent of the trustees sold for said scrip, and charging them with that value.

5th. That commissioner erred in refusing to allow the trustees commissions on the monies received and paid by them or their agents on certain bills of exchange, and notes pledged by Salisbury and Riffin before their assignment to Benoist and to Shaw, and which the trustees redeemed by collecting funds and applying them for that purpose.

6th. That commissioner calculated interest on whole amount of those demands of first class on which partial payments had been made, up to 7th December, 1846.

7th. That he reported complainant's demand at too large an amount.

8th. That he did not allow trustees interest on the payments made to complainants, and yet calculated interest on whole demand up to 7th December, 1846.

There had been deposited before the assignment with L. A. Benoist & Co. by Salisbury & Riffin, bills and notes as collateral to secure payment of money borrowed to amount of \$6490 58, which debt to Benoist is scheduled in first class; also other bills and notes had been deposited for a like purpose, with H. Shaw, to amount of \$3301 59.

On these two claims of Benoist & Shaw, in full payment thereof, the trustees paid the sum of \$3541 36 to Benoist, and \$2373 59 to Shaw, on the collection and payment of which the court allowed no commissions.

The payments to second and third class creditors, were made in goods at prices greatly above their value, and in Illinois scrip also at par, when it was worth only 50 per cent., and amounted to between 5 and 6000 dollars; (See the answer and schedule) and on making those payments, only goods to the actual value of \$862 27, and scrip of the value of only \$949 11 were applied.

### SPALDING & TIFFANY, for appellants.

1. The trustees were not responsible under the circumstances, for the acts of their agent, and the decree should have, accordingly, dismissed the bill. By the assignment, they were not liable for the acts of their agents. The matter complained of was application of funds to the wrong classes. This was done by Salisbury entirely, without orders or even the knowledge of the trustees, and in good faith on his own part.

The only testimony, was the answer which complainant agreed should be read in evidence as true; and the statement of Salisbury, examined on behalf of the complainant. From them it appears that there was good faith on the behalf of all of them. The trustees used due caution and required monthly returns of their proceedings by the agents, and as soon as one of them heard of the misapplication of funds, he immediately interfered, and no further misapplications were made.

2. Story's Equity, 513, sec. 1269. The rule in all such cases is that where a trustee acts by other hands, either from necessity or conformably to common usage, he is not to be made accountable for losses. This is true, when the trust as created and imposed on the trustee, is not coupled with an express exemption of the trustee from liability from the acts of agents.

2 J. C. R. 76, trustee is not held responsible on slight grounds, when there is evidence of fair and upright intention. 4 J. C. R. 419, do. Willis on Trustees, 167; (Law Lebr. 8 vol. 79.) "It is presumed that trustees have faithfully executed their trust, unless the contrary clearly and unequivocally appears."

Ibid. 185, 6. "Trustees are anxiously protected against responsibility for accidental losses which happen in the ordinary course of a due execution of their trusts. This was formerly held only to apply to the trustees individually, and not to those employed by them; but



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the rule is now extended to those cases where the trustees either from necessity or according to custom, act through the medium of others." 2 Mad 142, 3 to same effect.

1 Story's Eq. 107, Lee 90. Case of executors and administrators paying debts or legacies on good faith, and on probable grounds, will be relieved against creditors. Of course the creditor has a right to proceed against the legatee.

Analogous doctrines can be considered as applicable to agents and sub-agents. See Story on Agency, Sec. 201: "That the original attorney or agent will not be liable for the acts and omissions of the substitute appointed or employed by him, unless indeed, in the appointment or substitution he is guilty of fraud or gross negligence, or improperly co-operates in the acts or omissions."

The agent will not be responsible for the negligence or misconduct of the sub-agent, if the employment of the sub-agent is authorised by the principal, either expressly or impliedly by the usage of trade, and he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. Ibid. sec. 217 a.

There was no unfitness or want of competence or integrity in the agent selected by the trustees. Salisbury was a more proper person in many respects than any other, from his intimate knowledge of the debts and accounts, and transactions of the late firm. See 11 Peters, Rep.; Tompkins vs. Wheller, at page 119, 120.

The assignor acted as agent, and the court considered him as much more competent than a stranger, and that his acting as such was no badge of fraud.

There is nothing in evidence tending to show that his character was in any respect exceptionable; which fact, want of integrity and fitness, would certainly have been proved, had it existed. His character therefore, was good, and he was in every respect a proper person to act as agent, unless the circumstance that he had made the assignment disqualified him. So far from this being the case, the assignor is very frequently employed in that capacity both by assignees and by creditors, when the character is good; thus shewing the opinion and consent of men of business, that such an appointment is prudent.

The commissioners report was affirmed, and the final decree made on the basis of it.

In this report were sundry errors excepted to; but the exceptions were overruled, and an exception was taken by appellants to this ruling of the court.

1. The commissioner erred in his statement of the amount of debts of the first class, and in the adjustment of the amounts to be paid on each. For the purpose of declaring the pro rata on these debts, he took the date of 7th December 1846, and calculated interest on them up to that time. The object was to ascertain what was the dividend on each, and especially on Tucker's demand. The way to do this was, to stake all those debts of the first class, and calculate interest on them up to the date above; then take all the assets, the whole amount of money to be divided, and apply it pro rata, on them. In this way the true dividend to which each creditor was entitled would be got at. But the commissioner did not do this. On most of those debts of first class, he did not calculate interest up to 7th December 1846; but on others, and those large ones, he did not. Had he done so, the aggregate of the debts would have been increased, and then the dividend on each proportionally diminished, so that the decree in the present case, would have been for a smaller sum.

2. The commissioner did not allow the trustees commissions on the amount disbursed in payment of Benoist & Shaw \$5914 95.

The deed of assignment provided for compensation, and they were as much entitled to it on this sum, as on any portion of the fund.

3. The commissioner did not allow interest to trustees on their partial payments made on complainants demand, while he calculated interest on the whole demand; so that the complainants debts as reported by him, on which the dividend was to be made, was too large.

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Judge BIRCH delivered the opinion of the court.

It is deemed unnecessary, in this case, to notice the points which have been raised respecting the proceedings and report of the commissioners. It is apparent that the trustees, out of more abundant pendance, expressly exempted themselves from any other duty than to appoint proper substitutes, and from liability beyond the proceeds actually coming to their hands. No question has been raised respecting the proper performance of the first duty, and, it may be added, that every thing in the testimony, and in the nature of the transaction, goes to sanction the original employment of Salisbury. It is not pretended, either, that the trustees have not fully accounted for all sums which came to their possession, so that we are unable to perceive in what respect they have been derelict either to the terms or the spirit of the trust which they assumed, or how they can be held in any respect liable for the loss occasioned by the too sanguine calculation of a person deemed proper to be appointed in the first instances, and promptly dismissed when it was seen that, even from good intentions, he had departed from the terms of the trust. Judge Ryland concurring, the decree of the circuit court is therefore reversed and the bill dismissed.

### WILLIAM FINNEY vs. THE ST. CHARLES COLLEGE.

Whenever a deposition taken in a former suit is admissible as evidence in a subsequent suit between the same parties, a copy may be read upon proof of the loss of the original.

#### APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

##### STATEMENT OF THE CASE.

This was an action of covenant in the St. Louis common pleas, brought in August, A. D. 1848, by the St. Charles College against William Finney, on his alleged sealed note, which is in the following words, viz :

"\$1000. We hereby bind ourselves to pay to the curators of St. Charles College, one thousand dollars at the end of ten years from this date without defalcation, with interest to be paid

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semi-annually from date, at the rate of six per cent. per annum. Witness our hands and seals, this 1st day of November, in the year of our Lord one thousand eight hundred and thirty-six.

Attest,

J. & W. FINNEY, [SEAL.]

J. GREENE.

The general issue was pleaded, and the case was tried in March, 1849, when a judgment was rendered against Finney, from which he appealed. On the trial, the sealed note was first offered in evidence, and its reception objected to, on the ground that the plaintiff was not proved to be a corporate body, which objection was overruled. The plaintiffs then read in evidence the act of assembly incorporating curators of St. Charles college, approved the 3rd February 1837. The plaintiffs then offered in evidence what purported to be a copy of a deposition of one Greene, taken by a justice of the peace at Boonville in another case in 1846, pending in the St. Louis circuit court between the same parties. The only proof that it was a copy, was the statement of T. Polk, the plaintiffs counsel, that he believed it to be a copy; that it was lent to him as such by the magistrate who took it, and that he had read the original deposition in evidence on the former case. It was proved that Greene had died, and that the original deposition had been mislaid and could not be found. The reception of this copy in evidence was objected to as incompetent, inasmuch as the deposition had been taken in another suit, and at any rate, the original should be produced. The objections were overruled and the copy read.

The defendant gave in evidence a subscription paper without date, signed by the defendant, and sundry other persons, with sums of money opposite to their names respectively, \$1000 being opposite to defendant's name. This paper recited that George Collier had founded and established an institution called St. Charles college, and "placed it" to the Missouri conference of the Methodist church, on condition that the conference should raise for it an endowment, and that the conference had appointed a committee to form a board of trustees, and prepare a charter, and organize the college. It then stated that the subscribers contributed the sums annexed to their names for the purpose of endowing St. Charles college, the said money subscribed to form a permanent fund, the interest alone of which to be used for defraying the current expenses of the college, and if the sum subscribed should be more than sufficient for said purposes, then the surplus might be used in extending and furnishing the college buildings. The money was to bear interest at 6 per cent. payable semi-annually. This paper was signed by the subscribers in May, 1836, and named the committee who were to act as aforesaid.

Evidence was given tending to prove that such subscription was procured from defendant by representations made to him, that the institution would be a Methodist institution, and under the control and management of the Methodist church of which defendant was a member; and that if the Methodist would raise \$15,000, George Collier would give the college into their hands; and that the Missouri annual conference would have the control and management of it, which conference was the governing authority of the Methodist church, and consisted entirely of preachers; and that the subscription was obtained of defendant through his reliance on these representations. It was proved that the note sued on, was given for the amount so subscribed, and evidence was given tending to show that in giving it defendant still relied on said representations.

The corporation book was given in evidence showing the acceptance of said charter by the persons named in it, and organization and action under it even since its passage, or immediately after. The amendment of the charter, passed in 1847, was read, and proof given that the assurance required therein never had been given. It was proved that the title of the college buildings and property was made to and vested in said corporation, by deed of George Collier, dated the 21st August, 1838, to "the board of curators of St. Charles college," forever, "to be used forever for school purposes, and not to be appropriated or used for any other purposes."

The following instructions asked by defendant were refused:

1st. If the jury find from the evidence, that the bill sued on was given for a subscription made in favor of a private unincorporated institution, using the style of such private institu-

tion, which subscription was made before the plaintiff was incorporated, to written articles defining such private institution and its character, then there can be no recovery on this bill.

3d. That if the funds comprehending the bill sued on have been, by reason of the charter obtained by plaintiff, divested from the control and management stipulated for, as the consideration of the bill sued on, there can be no recovery in this action.

3d. If the jury find from the evidence that the bill sued on was a subscription obtained upon assurances relied on by defendant, that it was for the endowment of an institution to be under the control and management of the Methodist annual conference, and that the same institution has been legally free from such control and management, and still is, then the consideration of said bill has failed, and the plaintiffs cannot recover.

The court, of its own motion, gave the following instruction :

"If the jury believe from the evidence that the defendant was induced to give the bond sued on, by the assurance that the institution for whose benefit it was designed, should be under the control of the Missouri conference, and that the conference, by its committee or agents, selected the corporators, and selected them with a view to subjecting the general management of the institution to the wishes of the conference, and that practically the conference has exerted over it such general control, the assurance given has been sufficiently complied with.

After verdict, a notice for a new trial was made on all the points previously passed upon by the court; and because it was against law and evidence, and the weight of evidence, and against instructions, and for too large an amount, and because the copy of the deposition was admitted.

Exceptions were taken, in the progress of the case, to all the action and decisions of the court, adverse to defendant.

### SPALDING for appellant.

I. The consideration of the sealed note sued on could be, and *was* properly inquired into in the court below. Rev. Code of 1845, p. 832, sec. 19, 20 and 21; acts of 1846-7, p. 108. The act to simplify proceedings at law, sec. 1 and 6, authorizes all defences to be made under the general issue.

For the purposes of the defence, therefore, the bill sued on was no more than an unsealed instrument or simple contract. Story on promissory notes, sec 184. Failure of consideration, is equivalent to want of consideration.

II. The first instruction asked by defendant below, asserts that if the subscription of the \$1000 was to a private association of individuals, by a certain name, before any act of incorporation, and the note was given payable to the same name, that the inference of law was that it was payable to the incorporated association.

III. By the second instruction, the jury are directed that there can be no recovery if the funds of the college comprehending the bill sued on had been directed from the control and management stipulated for as the consideration of the bill. In other words, that the consideration had failed, if the facts hypothetically stated were true.

This is merely a definition of the failure of consideration under the circumstances. If such control and management were the consideration of the note, and if it was taken away, then the whole consideration, or *moving cause*, of giving the note failed, and there ought to be no recovery.

IV. The instruction given by the court was wrong in stating that *the assurance given to the defendant was sufficiently complied with*.

It is not a matter of law decided by the court, but of fact. The court assumes, that the bond was given after the act of incorporation was passed, and therefore that there could be no other control except that specified in the instruction; whereas, it was for the jury to judge when it was given, and whether the control intended was *indirect* by appointment of corpo-

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rators, &c., or whether it was direct, having the legal management and superintendence of the college. What right had the court to take this plea from the jury?

2. There might be two kinds of control, one *immediate* and *legal*, and *authoritative*: the other, merely persuasive, but not *legal*; which of these was intended, and was the consideration of the bond, or rather entered into the consideration, was for the jury to judge from all the circumstances of the case, and it did not belong to the court to decide.

V. The copy of the deposition of Greene was improperly admitted in evidence.

1. No case has gone so far as to let in a copy of a deposition taken in another case; and the principle adopted by some courts ought not to be extended.

2. It is wrong to admit a deposition taken in another case; it is wrong and dangerous in principle, as it operates a surprise; as it will compel every party to take every deposition in every trifling case, with the care and caution necessary in perpetuating testimony. As it is impossible in taking a deposition for a person to foresee all the occasions in which it may be produced, and therefore it is impossible that he should so take it, as to fit such occasions, and bring out from the witness the facts necessary for them.

3. The statute does not contemplate such a use of depositions. Rev. Code of 1845, p. 416 and p. 419, sec. 20, the reading of them is confined to the case in which taken; and the use of them beyond, and in other cases, is not provided for in the act, but by implication denied.

4. There was an act for perpetuating testimony. Rev. Code of 1845, p. 792, covering the whole ground, and expressly giving notice that the deposition could be read in all *future litigations*. Thus the party is put upon his guard. He knows that he must, at his peril, examine the witness as to all things that relate to the subject matter. He is put in possession of all facts that are to be proved, that he may deliberate on their bearing, and be prepared to cross-examine, with reference to all possible future controversies.

But in the taking of a deposition in the ordinary way, the mind is drawn only and entirely to the matter litigated in that suit; and the effect on the cross examination, is of course, apportioned to the magnitude of the controversy. The parties are aware of the nature of the suit—know what is in issue in it, and of course, ought to be bound by the examination, once legally made, of the witness, whether it be oral or written, in case of the witness' death.

5. The case in 4 Miss. Rep. 113, is wrong in principle; seems not to have been debated, and one judge (Wash) was absent that whole term. It was not the decision of a full court.

VI. The third instruction asked by defendant below, and refused, is substantially like the second, but considerably modified in this, that it makes the *legal control* and management of the institution, the consideration of the note, if the facts hypothetically stated, are found by the jury.

### POLK for appellee.

1. The court below committed no error in allowing the note sued on, to be read in evidence to the jury. It was charged to have been executed by defendant, and was so declared on, and its execution not denied on oath. If then, when it was made, the plaintiff had legal existence as a civil person, it was clearly competent, and when the objection was made, based on the ground, that there was no such person as the plaintiff, it was stated by plaintiff's counsel, that his next piece of evidence would be the charter of incorporation creating the plaintiff as a civil person, and this evidence was accordingly next produced. The note was defendant's instrument executed by him. It, therefore, did not lie in his mouth to object to it.

2. The court below, did not err in admitting the copy of Jesse Greene's deposition.

The original of the copy offered, was a deposition taken in a prior case between the same parties on the same instrument sued on in this case. The first suit having been for instalments of interest, and the present one, for principle and interest subsequently accrued.

Now the original deposition would have been competent. This has been expressly decided by this court.



See Tindall vs. Johnson, 4 Mo. R. 113.

The paper offered, purporting to be a copy of Greene's deposition, was proved to be such copy. And the original, which had been on file in the case which it was offered in evidence, was also proved to be lost or mislaid, and could not be found or produced. And the deponent Jesse Greene was proved to have died before the commencement of this suit.

Now the original deposition being lost, it was competent to give the original in evidence. For even a record which is lost may be proved by parol testimony.

Graham et al vs. O'Fallon, 3 Mo. R. 510; note 723, p. 387 of Phil. Ev. and authorities there cited.

3. The first instruction prayed by defendant's counsel was properly refused.

Now even if the bill sued on, had been given for a subscription to a private unincorporated institution before its incorporation, yet if such subscription was made for the use and benefit of such institution, and with the view that the institution was afterwards to be incorporated in the same name, and for the same purposes it had before incorporated, and if afterwards the institution was actually so incorporated, and continued after its incorporation as it had been before, then undoubtedly the fact of incorporation would not be sufficient to prevent the plaintiffs from recovering.

4. The common pleas court committed no error in refusing to give the second instruction prayed by defendants counsel.

The evidence before the jury did not justify the giving this instruction.

1. There was nothing of evidence before them, either showing or *tending* to show that any of the funds of the college had been diverted from the control or management *stimulated* for.

2. In the next place, the instruction assumes it as a fact that the consideration of the bill sued on, was the control and management of the college, by the Mo. annual conference. Whereas, this was a matter of fact, which had to be found by the jury, and therefore ought to have been left to them.

Again this instruction seems to assert, only in more general terms, the same proposition as is put more in detail in the third one, prayed by defendant's counsel, and ought therefore, to have been refused, by the court, for the same reasons, that the third instruction was refused.

5. The third instruction prayed by the defendant's counsel, ought to have been refused upon the evidence before the jury.

In the first place, the instruction submits it to the jury to try and determine whether the college had been *legally* free from the control of the conference. Thus it expressly submitted in so many words, a question of law, to the arbitrament of the jury.

In the second place, what constituted the control and management of the institution, was a question of law to be passed on by the court, upon the facts in evidence. In other words it was the province of the court to tell the jury what constituted the control and management of the institutions, and it was the province of the jury to find whether the facts existed or had been proved, which were sufficient to constitute such control. Just as it is the duty of the court to tell the jury what constitutes fraud—what are its badges. And of the jury to find whether these badges have been proved as matters of fact.

6. To show that the instruction given by the court, was correct. I remark:

*First.* That it will be manifest from an examination of the bill of exceptions that the instruction given, was applicable to, and covered the facts of the case as developed by the evidence, and was therefore, pertinent, and in point.

*Second.* The instruction tells the jury, as was proper to be done, what constitutes a control and management of the college by the conference. And also what constitutes a compliance substantially with the assurance that the conference should have control of the institution.



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BASIL W. ALEXANDER vs. JNO. SCHREIBER & HENRY W. HESTERHAGEN.

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Judge BIRCH delivered the opinion of the court.

We think, under all the circumstances of this case, that it was well enough tried in the court below. It is perceived by reference to the bill of exceptions, that the deposition of Greene was taken in a similar suit between the same parties in 1846, and that the defendant was present and cross-examined the witness. It is too late to question the reasonableness of the policy of permitting such a deposition to be read in a subsequent suit between the same parties, and the analogous authorities are scarcely less explicit respecting the admissibility of copies, properly evidenced, after proof of the loss of the original.

In this case, it was proven, firstly, that the magistrate who took the deposition in the former suit, made out and sent the plaintiffs counsel a copy—as is frequently requested for the purpose of informing them of the nature of the testimony. It was next proven that the record of that suit, including the original deposition, was lost or mislaid; and the witness, who is an intelligent lawyer, and of counsel for the plaintiffs in both suits, swears that having read both the original and the copy, he believes them to be alike. The case, therefore, from its nature, does not seem to disclose the existence of other and better evidence, and we perceive no error, in permitting the copy thus proven, to be read to the jury as proving the contents of the original.

It is deemed unnecessary to review the action of the court below in refusing to give the instructions asked for by the defendant—the one subsequently given of its motion having covered the entire case in such manner as to place its merits substantially, fully and fairly before the jury. Let the judgment, therefore, which was rendered upon their verdict, be affirmed.

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**BASIL W. ALEXANDER vs. JNO. SCHREIBER & HENRY W.  
HESTERHAGEN.**

A executed a deed, containing the words "grant, bargain and sell," to B, conveying to him a tract of land; B afterwards conveyed the land to C in trust; C sold the land as

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trustee, and D became the purchaser. After his purchase, D discovered that at the date of the deed from A to B, there was a mortgage upon the land which still remained unsatisfied. D instituted a suit at law in the name of B, or to his use against A, for breach of the covenants in the deed from A to B, and obtained judgment for the purchase money. A now files his bill and seeks to enjoin the judgment upon two grounds: first, that at the time A executed the deed to B, the incumbrance was known to both, and that there was then a verbal agreement that A might at some convenient time remove the incumbrance and should not be liable upon the covenant in the deed; and second that B had never authorised D to use his name in the suit at law.

Held, that by the purchase of D under the trust sale, he acquired all the rights imparted in the deed from A to B, including the use of his name in the suit at law; and that the understanding between A and B, would not be binding upon D, unless brought home to him at or before the period of his purchase.

#### APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

#### STATEMENT OF THE CASE.

One L'Esperance was the proprietor of land embraced in what is called L'Esperance's addition. He gave a deed of trust of the same to secure to Chouteau a debt for more than \$10,000. Subsequently and previous to 1841, he conveyed several lots to Alexander, covered by the deed of trust. 20th August, 1841, Alexander conveyed to Schreiber, three of these lots, numbered 37, 38 & 39. His deed contained the words "grant, bargain and sell." On the 13th November 1841, Schreiber conveyed the same to one Hollzle as trustee to secure certain debts, and Hesterhagen became the purchaser of the same lots at the sale of the trustee. This last sale took place 4th May 1843. Soon after the sale to Schreiber, he discovered there was an imperfection in his title by reason of the trust deed to Chouteau, and made complaints about it to Alexander. Hesterhagen seems to have become aware of the same defect soon after he became the purchaser, and also made application to Alexander to have the title perfected. Nothing effectual was done by Alexander, and on the 26th day of October 1843, Hesterhagen commenced suit at law in the name of Schreiber, to his use, against Alexander, on the covenant of his deed. This suit was brought in St. Louis circuit court, and was defended by Alexander. Pending the suit, and on the 6th day of November 1844, Alexander obtained a release to himself of the trust deed to Chouteau. Subsequent to this, and on the 9th day of February 1845, the suit at law was tried and determined in favor of the plaintiffs, and damages assessed at \$1036 00. The case was carried to the supreme court by appeal on the part of Alexander, and after elaborate argument the judgment was affirmed. (The report of the case is to be found 10 Mo. Rep. 460.)

After the affirmance of the judgment, and on the 3d August 1847, Hesterhagen executed and tendered to Alexander a deed conveying back the lots to him. He refused to accept it. About the same time Alexander applied to Schreiber and obtained a paper from him, professing to release the damages recovered, so far as he rightfully could release them. Alexander then commenced the present suit, by filing his bill on the 23d of November 1847. The bill states the case, and the history of the proceedings at law down to their termination as hereinbefore set forth. The bill moreover states that at the time when Alexander sold to Schreiber, he was aware that Chouteau had the deed of trust, and the parties agreed, that Alexander at a convenient time should procure a release of that deed and in that event should not be liable on his covenant. The bill furthermore states, that Alexander since the trial at law, had discovered that Schreiber had never authorised the proceedings at law, in his name, and the same were prosecuted without his consent.

The bill prayed for an injunction against the judgment at law. The injunction was granted. The answer of Schreiber was taken by consent, without oath. As Schreiber claims nothing under the judgment at law, no notice is taken of his answer. Hesterhagen by his answer

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travenges the agreement between Alexander and Schreiber, and besides insists that if it made, it was void by the statute of frauds. As to the assent of Schreiber to the proceedings at law, he pointedly denies the statements of the bill and asserts that the suit at law was brought with the express consent and approbation of Schreiber. The other matters of the bill were not controverted by the answer. The answer moreover states the tender of a deed to Alexander as hereinbefore set forth. Replication was filed to the answer, and the cause set for hearing. On the hearing no proof was made of the agreement between Alexander and Schreiber as to procuring the release of Chouteau as stated in the bill, and the weight of plaintiff's testimony went to show that Schreiber did not ever know of the deed to Chouteau, when he purchased of Alexander. Schreiber, the plaintiff's witness, and strongly in his interest, swears, "when I bought this land of Alexander, I did not know of the deed of trust to Chouteau. We had no agreement, at all about it. After the suit was brought, I knew of it. Alexander told me, there was a suit about the title, but he said he would make it all right when Chouteau got back from New York."

Sarpy, another witness for plaintiff, says in a general way, that "every body knew that Chouteau had a deed of trust on the whole tract. I don't know that any proclamation was made of the fact. Don't know as Schreiber asked me or knew of the fact."

Lesperance, the third witness says, "Sarpy, Chouteau's agent, promised Schreiber that Chouteau would make the title good, when he got home from New York. This conversation was at the sale, and on the ground." Such was the evidence as to the agreement between Schreiber and Alexander, as stated in the bill. On the other point, i. e. The institution and prosecution of the suit, in Schreiber's name, without authority from him, the only evidence relied on by the plaintiff, to overthrow the answer, was the testimony of Schreiber. This witness says, "I heard there was a suit against Alexander for land. I employed no one to bring any suit for me, never knew that there was one, till I was told of it." He says, "I talked with Hoelzel about the suit; he spoke with me a hundred times about it. Hesterhagen said the title was not good, he had brought a suit against Alexander he told me. I thought the land didn't belong to me any how. I supposed Hesterhagen had the whole control, after the sale, under the deed of trust. So I did, and said, when he said he had brought suit. I had no right, I thought. The paper states that the suit was brought without my knowledge. I know nothing at all about that suit of Heisterhagen against Alexander. I did know one was brought. Heisterhagen said he should sue Alexander. I said nothing. I had nothing to do with it. I didn't object because I thought I could'nt. As to going to Primm and Taylor's office with Heisterhagen about his suit with Alexander, I believe I once did go, but I don't recollect what I did or said. I don't like to say this suit was talked about."

On the other side, the defendant proved by three witnesses that the suit at law in Schreiber's name, for Heisterhagen's benefit, was brought with the full knowledge and consent of Schreiber. The defendant also proved by Whettelsey, that a deed conveying back the lots to Alexander, was tendered before the commencement of the chancery suit. It also appeared from Hoelzel's evidence, that after the affirmance of the judgment at law, in the supreme court, Heisterhagen made a deed of a house to Schreiber, the consideration of which was some balance that was supposed to belong to Schreiber in the equitable adjustment of the judgment against Alexander between them. This fact was denied by Schreiber. The deed for the house was produced, and it expressed a consideration of one hundred dollars. Plaintiff objected to any testimony, proving any larger or other consideration, and took an exception.

On the whole evidence, the court below made a decree dismissing the bill.

**GANTT**, for appellant.

1. That the bill discloses an agreement between complainant and Schreiber, of such a nature, that the suit at law was in fraud of the rights of the parties to that agreement; and there-

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fore the complainant is relievable in equity against the judgment at law. Hoffman's Ch. R. 412.

2. The proof at the hearing shows that Heisterhagen has no real right to the judgment nor any interest therein; and therefore, upon the answer of Schreiber, a decree should have been made in conformity with the bill and answer of Schreiber, and the non-interest of Heisterhagen.

3. There is no equity in the proposal made by Heisterhagen to re-convey the land to Alexander, provided Alexander will pay the judgment and interest to him. In the first place, Heisterhagen has not the rightful control of the judgment, although under a pretended right thereto, he seeks to harass and oppress Alexander: secondly, this proposal seeks to impose upon Alexander the interest (compounded) of the purchase money, while the rents and profits of the lot have been taken by Schreiber and Heisterhagen from 1841 to 1847.

4. Heisterhagen has practised a fraud in commencing a suit on a claim to which he has no title, and seeking to avail himself thereof, not only in contradistinction, but opposition to the claims of the owner of that claim, Schreiber. In order to disclose that fraud, there was a necessity for recurring to a court of equity. And equitable jurisdiction having attached for one purpose, will be retained for all purposes.

5. Admitting that the case might have been defended at law by showing non-disturbance, so as to have reduced the damages to a nominal form, yet in as much as the collection of the judgment is sought to be restrained on grounds entirely independent of this defence, the failure to interpose it at the trial at law is unessential to the present enquiry.

6. If Schreiber sought to enforce this judgment now against Alexander, instead of having released him from all liability thereon, he would have no right to offer a re-conveyance of the land, and claim in lieu thereof, the purchase money and interest; for he has all that he bargained to have, and has no claim to a rescission of the contract.

7. A judgment at law, for a breach of the covenant of seizin, does not rescind an executed contract; and the bill in this case is substantially a bill to compel Schreiber and Heisterhagen to rest satisfied with the full performance of every condition of the executed contract. The bill shows such performance; and prays that nothing further or different, be enacted from complainant. That this prayer should be granted. See Reese vs. Smith's adm'r. 12 Mo. Rep. 344.

8. It would be impossible to settle at law, definitely the conflicting claims of Schreiber and Heisterhagen to the judgment against Alexander.

### TODD and KRUM, for appellant.

1. The judgment at law has been in fact satisfied by the agreement and release executed by Schreiber to Alexander, and it was the duty of Schreiber to recall his execution, and enter satisfaction of the judgment; but he not having done so, and as the execution was sought to be enforced, this bill is filed for the purpose of restraining the collection of the execution, and to compel satisfaction of the judgment. The appellant therefore contends, that courts of law and courts of equity, have concurrent jurisdiction in cases like this to compel satisfaction to be entered. It was the right of complainant to make his election into which tribunal he would go for relief. This court will not undertake to control or interfere with this right of the complainant.

2. Under the facts in this case, a court of equity is the more appropriate tribunal to afford the proper remedy, because in one aspect of the case, it may be deemed equitable to decree that the complainant shall pay nominal damages and costs. This course may be deemed equitable, in view of the rights of all the parties, who claim an interest in the judgment.

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**FIELD, for appellee.**

I. By reference to the complainant's bill it will be seen that the two equitable grounds on which he proceeds, are, 1st. that Schreiber had made a parol agreement with complainant at the time of the purchase of the lots, and the execution of complainant's deed, by which the covenants in the complainant's deed were modified. 2nd. That the suit at law, sought to be enjoined, was commenced, and prosecuted without the consent of Schreiber, the nominal plaintiff.

It is sufficient to say that neither of these grounds has any support in the testimony. There was not even an attempt to prove the first; the second was abundantly disproved by the witnessess.

II. Apart from the grounds mentioned above, there was not a fact stated nor a ground of relief presented, which the court of law was not competent to give the plaintiff the benefit of. So far therefore, as these matters are concerned, the decisive objection is that a court of equity has no power to correct the errors of a court of law or to relieve the party from the consequences of his own negligence or unskillfulness in managing his defence at law. The case of *Watson vs. Cathcart*, 10 Mo. Rep. 100 is relied on.

III. There is really no hardship in the complainant's case; for it appears that Heisterhagen has ever been ready to deliver, and has in fact, tendered a reconveyance of the land to complainant. He therefore, receives back his land on repayment of the price.

**Judge BIRCH delivered the opinion of the court.**

We are of opinion that under the purchase of Heisterhagen, he acceded to all the rights imported in the conveyance from Alexander to Schrieber, including the use of his name in the suit at law: and that if any private understanding between the latter had been ever proven, it would not have been binding upon the conscience of the former, unless brought home to him at or before the period of his purchase. What the rights imparted by that conveyance were, has been previously decided by this court, in a suit at law between the same parties, concerning the same transaction, (10 Mo. 460) and although the release by Chouteau might perhaps have been admissible enough in that suit, under proper pleadings, to have reduced the damages to a sum merely nominal, that consideration furnishes to our minds, but an additional reason why it cannot be available here.

It may not be amiss to add, that in the application (as above) of the general principles by which this case must be governed, any suggestion of seeming hardship or inequality between the parties is, to our minds, sufficiently answered and repelled by the prompt and continuous offer of Heisterhagen, to reconvey the land to Alexander, upon payment of the judgment at law.

Upon the whole case, therefore, we think the circuit court committed no wrong in dismissing the bill; and its decree is accordingly affirmed.



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 RICHARD TUMILTY vs. THE BANK OF MO., Garnishee of Wm Smith.
 

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## RICHARD TUMILTY vs. THE BANK OF MO., GARNISHEE OF WM. SMITH.

Plaintiff, who was a bona fide holder, for value, of a negotiable note, instituted suit against defendant, who was the first endorser. The defence was that defendant endorsed the note when blank, with the understanding that it was afterwards to be filled by the maker with a certain amount, and that the maker filled the note with a much larger amount than that agreed upon.

Held, that such conduct on the part of the maker, amounted only to a breach of confidence, and is no defence to the action.

### APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

#### STATEMENT OF THE CASE.

This was an action of assumpsit upon a promissory note brought by the appellee as holder against the appellant as first endorser of a note purporting to have been made by George Breen in favor of Richard Tumilty as payee, and to have been endorsed by him to Bernard Dillon, and by Dillon to the bank.

The defendant below filed the statute plea, and also on the 17th March, 1848, an affidavit stating the transaction, and denying the execution of the instrument.

When the case was called for trial, the defendant presented an affidavit for a continuance on account of the absence of two witnesses, Dillon, the second endorser of the note sued on, and Hudson, an endorser on another note, supposed by defendant to have been made at the same time and in the same manner, and to have been a part of the same transaction. Upon reading the affidavit, which stated what was expected to be proved by them, the court suggested that the plaintiff might safely admit all the facts stated, whereupon it was agreed by the counsel that the written examination of these witnesses, taken down before law com'r. Watson, in a charge of forgery against Breen, should be read in evidence as their testimony, with the same effect as if the witnesses were produced in court; and the trial proceeded.

The plaintiff proved the signatures by Breen, and read the note, protest, &c., in evidence, the defendant excepting, and closed his case.

The defendant proposed to prove, and offered evidence tending to prove the facts stated in the affidavit, filed with the plea, to the effect,

1st. That Breen, under pretence of getting Tumilty to endorse a note for him in blank for \$150. to go in bank, had procured him to put his name on the back of two printed blank notes, by telling him that the first one was not written well enough to go in bank, and then clandestinely carrying away both blanks, which he afterwards, without the authority, knowledge or consent of Tumilty, filled up one for \$540, and the other for \$620, and got discounted in bank; and that Tumilty had delivered him one blank instrument, with the express agreement that it was to be filled up for \$150 and no more; and that Breen had privately taken away the other without any authority being given by Tumilty with regard to it; and

2nd. That one of these notes, the one sued on in this case, was taken by Breen to Dillon while yet blank, with Tumilty's name on it; that Breen told Dillon it was to be filled up for \$300, and go in bank for that sum: that Dillon endorsed it with the express agreement and understanding between them, that it should be filled up for \$300 and no more; and that it was filled up and negotiated by Breen for \$540, (with intent to defraud, of course.)

But the court being of opinion that neither state of facts, if proven, amounted to a good defence, ruled out and excluded the greater part of the evidence offered, some of it on other

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grounds of incompetency, but chiefly upon the grounds above stated, to which exceptions were saved, and then for the purpose of more distinctly embodying the facts and the questions, the defendant asked the following instructions, which were refused, viz :

1st. "If the jury believe from the evidence, that when Bernard Dillon wrote his name upon the note sued on, he was told by Breen, and it was understood between them, that it was to be filled up for three hundred, or three hundred and fifty dollars, and no more, and that Breen afterwards filled up said endorsement for a note for five hundred and forty dollars, and negotiated it to the plaintiff, and that the note sued upon in this case is the same one, they will find for the defendant.

2nd. "If the jury believe from the evidence that the note sued on is one of two blank notes, on which George Breen procured the defendant to write his name as endorser, under an agreement and understanding between them that he should endorse one note only for \$150, and that he got his name on two blanks by telling him that his name was not written well enough on the first to go in bank, and then clandestinely carried away both blanks, without the consent of the defendant, and afterwards filled up and negotiated both blanks, one for \$540, the note sued on, and the other for \$620, when only one note was intended or authorized by defendant, they will find for the defendant." Exceptions were taken. The court then, of its own motion, gave the following instructions, to which an exception was taken, viz :

"If the jury believe from the testimony that the defendant endorsed the note in question before the same was filled up, and entrusted it to the maker, George Breen, for the purpose of being filled up and discounted at the bank, it is no defence to this action, that the said note was filled up for a different or greater amount than was intended or understood by the defendant."

Whereupon the jury were allowed to find a verdict for the plaintiff; a motion for a new trial was filed and overruled; a bill of exceptions filed and an appeal taken to this court.

### HOLMES for plaintiff.

1. Forgery renders the instrument utterly void *ab initio*; no right can be given and no obligations created by it; and it is a valid defence against a bona fide holder for value without notice.

Boyd vs. Brotherton, 10 Wend. 93; Chit. Bills, 286-7 and note (1); Sto. Bills, sec. 410, 450, 451; Sto. notes, sec. 137, 138, 379, 380, 381, 386-7; Salem bank vs. Gloucester bk, 17 Mass. 1, 30, 32; Smith vs. Mercer, 6 Tann. 76. No title can be derived through a forged endorsement. Lancaster vs. Baltzell, 7 Gill and J. 468, 9 Gill and J. 342.

2. The making of a false instrument over a genuine signature is as much forgery as the making of a false signature to a genuine instrument. J. Russ. Cr. 319, Hall vs. Fuller, 5 B and C. 750, must be genuine in every respect. Chit. Bills, 287, and n (1) 747, 748, Bal. Abs. Fit. For. (A) 745; Rex vs. Hart, 7 Can. and P. 652.

3. No special intent to defraud any particular person is necessary to constitute forgery, but a general intent is sufficient; and if the *probable consequence* of the act be to defraud, that will, in law, constitute a fraudulent intent, and the intent will be enforced in law. Rex vs. Mazagora, 1 Eng. Cr. Ca. 291; 2 Russ. on Cr. 36; Archb. Cr. P. C. 342, Regina vs. Beard, 34; Eng. C. L. R. 329, (8 Can. and P.) Reg vs. Parish, 34 Eng. C. L. R. 307, (8 Can and P. 91) Chit. Bills, 753.

4. The filling up of a blank endorsement for the sum of \$540, when there is authority to fill up for \$150 only, or when there is no authority to fill up at all, and negotiating the same with intent to defraud of course, is forgery, and the instrument is void *in toto*. Rev. Stat. 1845, p. 371, sec. 16, provides that "every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demands or obligation shall be, or purport to be, transferred, created, increased, discharged, or diminished, &c., &c., shall be guilty of forgery in the 3rd degree."

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Rex. v. Hart, 7 Can. & P. 652, (S. C. Ry. & Moo. Cr. Ca. 486,) held by the twelve Judges of England unanimously, that the filling of a blank acceptance for 500l. when there was authority for 200 l. only, was forgery. Fully recognised as law in 2 Russ. Cr. 321, and Archb. Cr. P. C. 342; there must be authority, Regina v. Beard, 34 Eng. C. L. R. 329; Reg. v. Parish 34 Eng. C. L. R. 307; Rex v. Forbes 32 Eng. C. L. R. 497 (7 C. & P. 224.) Goodman v. Eastman 4 N. H. R. 455, doctrine fully discussed and defined. Breach of *special confidence or trust*, or negligence, confined to cases of a fraudulent use, or abuse, of a general authority, and does not extend to a case of forgery. Principle of one or two innocent persons &c., does not apply, and no party to mercantile papers can be held to warrant against a felonious forgery. Not liable in consequence of negligence. Salem B. R. v. Gloucester B. R. 11 Mass. 30, 2, 45; if a person pays, or receives a forged bill, he is guilty of negligence, must bear the loss himself, and cannot even receive back the money from the person it was received from or paid to, unless immediate notice be given, 17 Mass. 45; Sto. a9 sec. 115; Price v. Neal, 3 Burr, 1354-7; Smith v. Mercer 6 Tann. 76; a plea that a blank was limited to \$2336, and filled up without authority for a larger sum, and therefore non est factum, held good, though no intent to defraud appeared to make it forgery. Hall v. Bank, 5 Dana 258; a man gets a piece of paper with a name on it and makes a note over it, there being no authority, held forgery, and maker not liable. [This signature was obtained in the same manner, that the first signature of Tumilty was by Breen.] Vance v. Sary 5. Ala 370; Sto. notes, sec. 138.

It depends on the fact of authority, or not, and the doctrines of agency; as to authority, *general* and limited, Chitt. Bills, 33 & n.; a special authority must be strictly pursued, and an authority to sign a note at six months, is no authority to sign one at 60 days, and the maker is not liable (even where no forgery was charged.) Batty v. Carswell, (Story a9 sec. 169.) 2 J. R. 48; 15 J. R. 44; "if the blank be filled by a person, who is authorised to do so, it will be obligatory." (Sto. Bills, sec. 53,) [and if not, *not* of course;] Johnson v. Blasdale et al. 1 Sm. & Mar. 17; the delivery of a blank to be filled up, for a note makes the party an agent to fill up: if the authority be general, it is a letter of credit for an indefinite sum, (Russell v. Longstaffe, Dougl. 496, 514;) if limited, the note is good for the sum authorised, and void for the excess, [where there was no intent to defraud charged to make it forgery.] Superadd this element, and it must have been held forgery and utterly void.

Mitchell v. Ringold, 3 Har. & J. 159, a blank with a general authority filled up for a particular sum, altered by the agent while yet in his hands, held maker not liable. Ground not fully stated, but the reason must have been, that when once filled up for whatever sum, (the authority being general) it became a note, and the authority was then exhausted; a genuine note; and then the alteration of it without further authority was not binding, or was forgery, and made it void; when the party has used the name of another without authority, he is liable himself, but not the man whose name has been feloniously used. Bank v. Flanders, 4 N. H. 239; Sto. a9, sec. 264, 308 & n. (2) sec. 309; sec. 456; the existence of a blank does not *per se* give authority to fill up, but may be evidence for a jury. Stout v. Cloud, 5 Litt. R. 205; (depends upon) and where no holding out as having general authority, parties equally innocent, and third person deals at his peril, is bound to inquire and must bear the loss himself. Sto. a9, sec. 126 and n. (1); 127 & n. (1) citing Lloyd, Paley on a9, 199 & n. sec. 131, 2; sec. 183 (p. 125,) the fact of authority, or not. Allison v. Rurdy, 6 Penn. St. R. 501. Blank endorsement to renew two notes; the two consolidated into one and the position and liability of the endorsers charged without authority, held whether authority or not, was a question for a jury; if not authorized, party not liable (no intent to defraud or forgery charged) Bell v. State Bank, 7 Blackf. 456; a printed blank at 90 days endorsed by Bell to renew note of Benbridge 90 days stricken out and thirty days inserted by clerk of the bank, by direction of Benbridge, (without any intent to defraud,) held Bell not liable, the authority was limited and that known to the bank. See Sto. Bills sec. 222, liability of endorser in blank (i. e. of a genuine

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note filled up) same as when filled up, "unless there should be a *known fraud* or a *known misappropriation*," [or of course, a *forgery not known*.]

That is to say, there are these defences:

1st. That the agent being held out as having general authority, was limited by private instructions and exceeded his authority (merely) and notice; or

2nd. That there was fraud (merely) and notice; or

3d. That the agent was a special agent with limited authority and not held out as having a more enlarged, or general authority, (good without notice) even when no intent to defraud to make it forgery.

4th. That there was that species of fraud, which amounts to forgery, (good without any notice.)

*Usury*, and gaming are by statute, and *forgery*, by the general principles of law, good defences without notice even against a bona fide holder for value.

5th. The following cases belong to the large class, which comes short of forgery; cases of an abuse of a discretion given as to the exercise of a general authority, which is absolute, though accompanied with a trust, a special confidence, that it will be exercised with fairness and prudence, or in good faith, according to the circumstances or contingencies contemplated: in which cases, the instrument when made, being authorized, is genuine, however much the discretion given as to the exercise of that authority may have been abused. Cases of a fraudulent use or application, of a genuinely made instrument, when the principle of one of two innocent persons &c. applies:

Taney vs. Gide, 4 Bing. 253; Putnam vs. Sullivan, 4 Mass. R. 45; Thurston vs. McRown, 6 Mass. 428; Storer vs. Logan, 9 Mass. 59; Bank of Am. vs. Woodworth, 18 J. R. 315 reversed; Mitchell vs. Culver, and Mech's Bank vs. Schuyler, 7 Cowen R. 336; Herbert vs. Heire, 1 Ala. R. 18; Huntington vs. Bank, 3 Ala. R. 186; and cases of a clear general authority, with or without misappropriation, or fraudulent use; Chit. Bills, 33 & n, (i) and cases cited; Smith vs. Mingory, 1 M. and S. 87; Cruchley vs. Clarence, 2 M. and S. 90; Braham vs. Rayland, 3 Stew. R. 260; Roberts vs. Adams 8 Pov. R. 297; Violet vs. Patton, 5 Cranch. 142; Bank vs. Smith, 5 Ohio R. 222.

A blank for the sum authorized for \$200, filed up for \$700, and discounted in bank; held liable, case briefly reported, not considered at length, and no authorities cited, no intent to defraud, a forgery charged or considered—put on ground of commercial paper and reposing confidence generally. Case not good authority; and if there was a negotiation with intent to defraud, it was forgery, and the decision is not law, and is not supported by any authority, I have been able to find.

If these positions be correct, then the court below committed error.

1st. In ruling out the testimony of Bernard Dillon and Henry Hudson: and,

2nd. In ruling out the testimony of Edward Walsh: and,

3rd. In refusing the plaintiff's instruction, and,

4th. In giving the instruction (of his own motion) for the defendant.

### **Bay, for defendant.**

1st. The note was transferred to the bank before maturity, consequently it was taken free of all equities between antecedent parties, the bank having no notice of such equities. Story on promissory notes, sect. 178. Besides in this case, the note is to be treated exactly as if it had been filed up before the defendant endorsed it, ib sect. 122.

2nd. The second instruction asked, was not warranted by the evidence. But even if it were the instruction was properly refused. The fact that a bill or negotiable note was obtained by fraud, affords no defence where the instrument comes into the possession of a *bona fide* holder for value, without notice, and before it is due. Chitty on Bills, p. 79.

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3rd. The declarations of the defendant were properly excluded, the court also properly refused to permit the defendant to impeach the testimony of his own witness, who completely disproved the pretended facts asserted by the defendant.

RYLAND, Judge, delivered the opinion of the court.

From the above statement, it will be seen that the appellant, places his reliance for a reversal of the judgment of the court below, upon the ground, that the facts disclosed in this case, amount to forgery in the obtaining of the signature of Tumilty as endorser on the note sued on. And this is the only point I shall consider in this case.

In order therefore to the better understanding of the facts, I will here insert the evidence of Bernard Dillon, Henry Hudson, and of George Breen.

The plaintiff called George Breen the maker of the note as a witness, who testified, that he knew the defendant that the note sued on, which is shown to him, as follows: "\$540,00, St. Louis Dec. 12th 1846. Four months after date, I promise to pay to the order of Richard Tumilty, five hundred and forty 00-100 dollars for value received, negotiable and payable without defalcation or discount at the bank of the State of Missouri. **GEORGE BREEN."**

Endorsed "pay to Bernard Dillon, or order" Richard Tumilty. Pay to the bank of the State of Missouri. **BERNARD DILLON.**

And written across the face with red ink. "Protested for non-payment. April 15th 1847, John Smith N. P. fees 1 75-100" witness said. "This is the signature (pointing to it) of Richard Tumilty, when it was written on the back of this note, we were in his room, and I saw him write it." "That is my signature as maker, and that is Bernard Dillon's as endorser." The above note was then read to the jury, and the plaintiff, then read in evidence the protest and notice, which were in proper form and to which there is no objection and which it is not necessary here to notice, and then the plaintiff rested his case.

The defendant, then after having called Richard King, who was about detailing a conversation which he heard between Tumilty the defendant and said Breen, and which conversation was objected by plaintiff and ruled out by the court; called as witness George Breen, who testified, "that he was at the house of defendant, on 22d Nov. 1846. That he came out on horseback, on Saturday evening, to see Tumilty on some business about a house, he had built for him. Stayed all night at Tumilty's. The next morning Tumilty endorsed two notes in blank at request



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of witness said—we were standing near the stable yard fence, I had pen and ink in my pocket and printed blank notes in my hat. I asked Tumilty to endorse one for me in blank—he did so, he wrote his name, resting on the top rail of the fence. Tumilty had previously endorsed notes for me in blank: after he had written his name on this note, I looked at it and told him his signature was not written well enough to go in bank; and asked him to write another, he did so. I took both notes into town with me—I never was asked by Tumilty, what sum I designed filling up the blank with *at all*. Tumilty endorsed for me in blank, as he had always done before, without asking any questions, I did not ask him to endorse a note for \$150, nor for any particular sum whatever, one of these two blanks I filled up for \$620, and put in bank. The other was not put in bank at all. Being asked, where that other note is, the plaintiff's counsel produced a note as follows to wit: \$550,00, St. Louis Nov. 25th 1846. Four months after date, I promise to pay to the order of Richard Tumilty, five hundred and fifty dollars for value received, negotiable and payable without defalcation or discount, at the bank of the State of Missouri—signed Lewis E. Brooks endorsed Richard Tumilty, George Breen, which the witness says is that other blank note, I thought, I'd just let Mr. Tumilty work out his passage, and then I would show this, when he had got through. The plaintiff's counsel had also in court some five or six other notes, which had been endorsed previously by defendant and had been negotiated and taken up, but the witness states, that the one above set forth is the identical one, which was endorsed on the top rail of the fence, and the one on which the name was written so badly. The witness further says, one of these notes was filled up for \$620, and put in bank, and I lifted it; and I would have lifted the other too, if Tumilty had paid me for the house I built him—one of the notes written at the corner of the fences, that Sunday morning never was in bank, the other filled up with \$620, *was* put in bank and I lifted it. I have suffered enough by that man Tumilty. This \$540, note I took to Dillon, to get him to endorse it. Tumilty's name was then on the note and the sum was blank. I told Dillon the note was to be filled up with \$540, when I took it to him to endorse it—cross examined. I had obtained blank signatures to notes of Tumilty, before this time. There had been eight or nine of them before. These accomodation endorsements of Tumilty for me commenced in the year 1845. From time to time as I found it necessary, I got him to endorse notes in blank for me to fill up and put in bank to get discounted, to help me through my business from 1845 up to the winter of 1846, there were eight or nine of these

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endorsements I think. Question.—In all those instances, were the notes entrusted to you in blank, after being endorsed by Tumilty? Defendant, I object to that question, for the reason, that the manner in which previous notes or endorsements had been obtained was not in question here and the whole evidence, about the previous notes was objected to for irrelevancy. The court overruled the objection and the defendant excepted. Ans. Those notes were in all cases entrusted to me in blank after being endorsed by Tumilty. I used these as it became necessary for me and I always filled up the sums myself before I put them in bank. These are the two notes Tumilty signed for me at the corner of the fence—(referring to the \$620 note and the \$——note above set out.) This note for \$540, (the note sued on) I got endorsed by Tumilty, sometime in May 1846, together with another note: Tumilty signed them at the house near the New Market, two blank notes. I swear positively, that I got this the note sued on in May or June 1846; I never used it until afterwards when I needed it. This \$540 note, now in suit, is not either of them signed by Tumilty at the fence.

I never used the note, the signature on which by Tumilty, I told him was not well enough to go in bank. This note is now in my possession and never was out of my possession. Re-examined. How do you know, that this is not the other note signed by Tumilty at the fence? Because it has never been out of my possession since. Question. Did you or not ever tell Mr. Linchey or Mr. King, that you filled up both notes, endorsed at the fence, one for \$620, and the other for \$540, and that you put them both in bank, when you were to put one note in bank for \$150: and no more? Plaintiff objects to the question for incompetency. Court sustains the objections and defendant excepts. I did not tell Tumilty, when he endorsed these notes, that I should fill them up one with \$620, and the other with \$540, I got both notes endorsed by Tumilty with his assent for me to use them as I pleased and when I pleased; no particular sum was ever mentioned.

Hugh Linchey examined for defendant. I once endorsed a note for Breen, which was to go in bank—never but once. Dont know exactly when, but the note was in blank with Tumilty's name on it as endorser. The defendant then proposed to prove by witness, that George Breen had admitted in his presence, that he had got Tumilty to endorse his name on two blanks in the manner stated by Breen himself above, with the understanding that he was endorsing one note only for \$150, and that Breen clandestinely took away both blanks and filled them up one for \$620, and the other for \$540, (the note sued on here) and that he

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had put them both in bank. The plaintiff objected to the evidence for incompetency as against the bank, the plaintiff. The court sustained the objection and the defendant excepted and the witness withdrew.

Bernard Dillon, a witness for defendant: one of the notes in question for \$540, endorsed by Richard Tumilty and deponent, is shown to deponent who says that is his signature, that he endorsed it for Breen and when he endorsed it, it was in blank. Tumilty's name was on it, when I endorsed it. I am not positive as to the time I endorsed it, but think it was about the 12th Dec. 1846, as near as I can recollect. Breen told me when I endorsed it, that he would fill it up for \$300 or 350, I am positive he told me one of these sums; but I dont remember which, afterwards I signed a check for Breen to draw the money and put an "F" in the check and on this account the check was returned to me by Breen, because he said, he thought it would not go in bank. It was then torn up, and another executed by me without "F." He did not ask me to sign another note, at that time, that I recollect. He did not tell me how to get Tumilty's name on the note, I am not positive, whether the check was in blank or filled up. I dont recollect for what sum it was drawn, I did not examine it very closely to see. The cross examination is not copied, nothing material to this case in it.

Henry Hudson: one of the notes is shown him, the one for \$620, he says that, that is his signature on the back of the same. I believe it was in the early part of January in the present year (1847) that George Breen called on me and told me that he wished to put a note in bank and requested me to endorse for him, I asked him the amount for which he wanted me to endorse: He told me \$300. I then asked him, who was going to endorse along with me. He said Dick Tumilty. He said "Henry" meaning me, that Tumilty is one of the best men in the State. I agreed to endorse it, expressly understanding it was to be for three hundred dollars. I did not endorse the note at this time and cannot say whether it was on the evening of the same day or the following day that I endorsed it. I rather think it was the day following, but not certain. The note was endorsed in my own room, and a blank check signed by me at the same time for the proceeds. These Mr. Breen took up and left the room. I am not aware of any other conversation at this time. The note was in blank when I endorsed it. Cross examined, I am not aware, that after I had endorsed the note, Breen said he would fill it up for \$300, I do not believe that any thing of that kind, was said, Mr. Breen appeared to be in a hurry and there was very little said, at the time, when Breen brought the note to me, when I endorsed it, I am not

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aware that any thing important was said by Breen. I cant say that he said any thing at all that I remember, on the occasion of the endorsing, I dont remember any thing that Breen said before or after the endorsing, after I had endorsed the note, there was nothing of this kind said, by Breen, to wit—that he would fill it up with \$300, nor any thing to that effect, that I recollect, when Breen first called on me and asked me to endorse the note, I can't say whether or not he had it with him. He did not produce it, at the time that Breen first called on me, and asked me to endorse this note, he did not say, that I recollect, that if I would endorse this note in blank, he would fill it up with only \$300. There was nothing then said about endorsing a note in blank, I mean, when I say it was the express understanding, that the note was to be filled up with \$300, that that was my understanding. I can't say, whether or not Breen at that time told me he would bring me a blank note to sign—I dont know that this note, here exhibited is the paper, that I agreed to sign in the first conversation, at the time I did sign, Tumilty's name was on it and the only one on it. I expected Breen to fill up the note. On being asked, why deponent, did not fill up the note himself, he replied that he considered Breen a man of high honor, and integrity and one in whom he placed implicit confidence and thereupon he entrusted the filling up of the note entirely to him. Direct examination resumed, when Breen first spoke to me, he told me he wished to put a note in bank for \$300, and he wished me to endorse for him, I can't say that at that time Breen had a \$300, I recognize this note here exhibited to me for \$620, as the note that I endorsed for Breen, with the understanding at the time, that it was to be filled up with only \$300, I mean that such was my understanding, I got this understanding the time that Breen requested me to endorse for him. This paper on which this \$620, note is written, and printed was not then shown to me. This (the \$620, note) is the paper which Mr. Breen brought to me to endorse at our second meeting. This is the only one that was spoke of at either interview. On the occasion that I endorsed the note, there was nothing at all said about a note that I remember, excepting Breen handed me this paper, in blank, meaning the \$620, note and I endorsed it."

There was other evidence given and excluded, on motion from the jury, but the above is the most important and indeed may be said to be *the evidence* in the case before the jury.

The defendant then asked the court to give the instructions above set forth in his statement of the case numbered one and two, which were refused, and the court then gave the instruction therein set forth on its own motion.

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I cannot come to the conclusion, that the evidence in this case will warrant this court in saying, that the endorsements were forgeries. I am satisfied on the contrary, that the testimony taken in its full latitude for the defendant does not make the endorsement of either Tumilty or Dillon a forgery. I have examined many of the authorities cited by defendants counsel and would fully agree with most of them. But the facts here, do not go beyond a breach of good faith, a breach of confidence. Here is a person in the habit of endorsing for another, in blank, trusting to him to fill up and to use the notes for what amount and at what time, he may need them most, giving full faith in his prudent use of said authority.

The notes are used from time to time ; and paid, or in the language of the witness "lifted" at maturity, one of these notes comes to the plaintiff in good faith for value, without any suspicion of a breach of confidence, of any fraud, and because the defendant says the note was to have been for a much smaller sum, he will not now pay it, says it is forgery.

I have stated, that the facts here do not extend beyond a breach of confidence.

I have my doubts whether as to the defendant Tumilty, they even go that far. There is a great deficiency in his proof of the charge. The witness Breen, gives a reasonable account of the transactions of the endorsements at the fence : and he states, that the note sued on, in this case, is not one of those then and there endorsed.

But had the defendant made out by proof what his counsel contends he has in this case, still in my opinion it would then have only amounted to a breach of confidence and not to a forgery. To declare such a transaction as is in proof in this case, a forgery, would give cause of just and serious alarm to the commercial community. It is better, that he who places implicit confidence and thereby gives the power of injury to another, should suffer himself, rather than that the public should receive detriment from such act.

The case from 5 Ohio Rep. 222, Bank vs. Smith is an authority in point, and I am satisfied, that justice, public policy, and the interests of society are in unison with the law, in asking of this court an affirmance of the judgment of the court below.

The other judges agreeing this court accordingly affirms the judgment of the court below.



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Where the instructions given by the court contain the law applicable to the facts of a case, the supreme court will not disturb the finding of the jury, if the evidence warrants it.

## ERROR TO ST. LOUIS CIRCUIT COURT

## STATEMENT OF THE CASE.

This was an action of assumpsit for use and occupation of a mill at Rushville, in the state of Illinois, brought by Moffitt against Von Phul & McGill, in the circuit court for the county of St. Louis, for the November term, A. D. 1844, thereof.

On the trial, Moffitt proved that one A. R. Skidmore acted as agent for Von Phul and McGill in leasing and managing said mill; that the mill was first leased from October 1, A. D. 1841, to January 1, 1842.

His witness, James B. Sweatland, deposed that in the early part of December, Skidmore wished to get the mill for another six months; that Moffitt was willing, giving as a reason that the mill was mortgaged to the bank of Illinois for a debt, and that the rent would aid him to pay it, and thereby perhaps save the mill for him, and that if Von Phul and McGill rented it again, he would like to have them pay the rent as it became due to the bank. This conversation ended by Skidmore telling Moffitt to send him, as soon as it was convenient, a written proposal, stating the sum and terms of payment for six months, from January 1, 1842, (see page 12 of record) about a week after. Moffitt, in the absence of Skidmore, handed a written proposal to witness, who was then Skidmore's book keeper. Skidmore returned the next day, when he handed the writing to him; and Skidmore said it was as favorable as he could wish, and that he believed he should close the contract, and have the writings drawn the first leisure time he had. The rent was to be \$650—\$100 in flour and bran; \$150 in repairs; the balance in money from time to time. He (Sweatland) afterwards heard Skidmore say that he had leased of Moffitt according to his proposal; that Moffitt was to make out the writings and leave them with his miller, Clements, which, upon his return from Pekin, he was to sign. Upon his return, witness asked him, if he and Moffitt had signed their articles. Skidmore replied he had not; that Moffitt had placed them in the hands of Clements, and he would sign them that day if he thought of it when at the mill. This occurred sometime in January, 1842.

Clements (the miller) deposed that Skidmore occupied the mill till the forepart of March, 1842. That Skidmore agreed to take another lease from Moffitt for six months from January 1, 1842, and he understood Moffitt was to prepare the writings, and Skidmore was to sign them; that about December 20th, Moffitt handed him, in the presence of Skidmore, a writing dated December 20th, 1841, purporting to be a lease to Von Phul & McGill of the mill for six months from January 1, 1842. Skidmore said he would sign it sometime during that day when he got time to examine it, if it corresponded with his understanding of the contract. At coming, witness handed him the writing which Skidmore said, after reading, was in substance correct, and that he would sign it upon his return from Pekin, where he was going the next day. Upon his return he refused to sign it, and said he was glad he did not sign it before he went to Pekin; for since then the bank had notified him of its mortgage claim, and that it would hold him responsible for the rents and profits of the mill; that exhibit C is the writing he has spoken of; (it purports to be a lease of the mill to Von Phul & McGill for said six months, for \$650 payable as aforesaid) that he held the writing till May 12th, 1842, and then delivered it to Moffitt at his request; (see pages 18, 19 and 20 of record.) James Dunlap deposed that neither

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A. R. Skidmore or Von Phul & McGill ever paid the bank of Illinois any rent for said mill; that said bank had a mortgage on said mill, under a foreclosure of which the mill was sold in September, A. D. 1842, until which time possession was with Moffitt or those claiming under him; that he was president of said bank; that June 19th, 1843, said bank received \$130 on account of rent of said mill, and relinquished then to said Moffitt all claim for rent that may be due from said Skidmore or Von Phul & McGill.

A. R. Skidmore, for Von Phul & McGill, deposed that he leased the mill for a time, to end January 1, 1842, that during this time the bank notified him of its mortgage, and that unless it was settled, it would hold Von Phul & McGill for the mill after January 1, 1842; that in December, Moffitt wanted him, as agent for Von Phul & McGill, to lease the mill of him for six months from January 1, 1842; that he refused so long as the bank claimed the right to it; that Moffitt then said if he did not, the defendant should not have it after January 1, 1842; that he then told him if he would satisfy the bank, so that it would release its claim, he would lease it of him. Moffitt agreed to this upon this condition, and arrangement was made for a lease. Moffitt drew up a lease, and put it into the hands of Clements, who showed it to him just as he was about to leave for Pekin; that he looked at it, but told him that he should not sign it till his return. Upon his return he received a notice from the bank that Moffitt had not settled its claim, and that it would hold him as agent for Von Phul & McGill, responsible for the mill; and he therefore refused to sign the lease. Moffitt then again assured him that he would still make it all right with the bank, and desired me to let him have some money for that purpose, and after some talking about it, he let him have \$130. About a month after, the bank again notified him that its claim was not settled, and that he must hold the mill subject to its order. He then closed up the mill, and left it in the fore part of March, and notified the bank of it. He remained in Rushville in settling up demands and the business till April.

The mill was left because Moffitt had not settled with the bank as was the express condition of the bargain for it and this made the situation of Von Phul and McGill uncertain; that he had paid Moffitt in flour, bran, repairs and money \$280.06 at the time of his leaving; the lease was to be for six months from January 1, 1842, for \$650, \$100, in flour, and bran, \$150 in repairs and \$400 in cash.

Upon this evidence on behalf of Von Phul and McGill the following instruction was asked for Von Phul and McGill to wit: "If the jury believe from the evidence that Skidmore made it a condition with Moffitt, before he would bargain with him for the use of the mill, that Moffitt should satisfy the claim of the bank so that the bank would release its claim, and that Moffitt did not do it as agreed, then the most that said Moffitt can claim of the defendants is for the time they used the mill—and if the jury finds this greater than the defendants have paid, their verdict should be for the excess, if equal only or less, their verdict should be for the defendants." The court refused this instruction to which, exceptions were duly taken.

But the court of its own motion, gave an instruction differing from the above only in this, to wit: by adding, after the words, "and that Moffitt did not do it as agreed," these words to wit: "and in consequence of such failure, Skidmore quit the premises," to which instruction exception was duly taken, on behalf of Von Phul and McGill. The court gave the following instruction on behalf of Moffitt, to wit: "But should the jury believe from the evidence, that no such condition was made, but on the contrary, it was understood between said Moffitt and Skidmore, that the rent of the property should be paid by Skidmore to the Bank as mortgagee, then neither the existence of the mortgage, nor any notice or claim of rent, by the bank as mortgagee could operate as an excuse for quitting the premises; and in this view, the defendants would be liable for the whole time specified in the agreement, after allowing all payments, which the jury shall find from the evidence, to have been made;" to the giving of which exception was duly taken, on behalf of Von Phul and McGill. The verdict was for Moffitt, for \$428.59. A motion to set aside said verdict, and grant a new trial was duly made, and for the following reasons, to wit:

1st. Because instructions given were erroneous.

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2nd. Because the court erred in refusing the instruction asked, on behalf of Von Phul and McGill.

3rd. Because the verdict is against law.

4th. Also against the law under the evidence.

5th. Also against the weight of evidence.

6th. Also against the evidence.

7th. Because the court in its instructions assumed the existence of facts, which were disputed and should have been left to the jury.

This motion the court overruled, to which decision exceptions were duly taken on behalf of Von Phul and McGill.

The case is brought into this court as upon writ of error.

### Todd, for plaintiff.

1st. The court erred in refusing to give the instruction asked for, on behalf of the plaintiffs in error, because the non-performance of a condition of a contract by one party, authorizes its abandonment by the other. Story on contracts, p. 467, sec. 670.

2nd. The court erred in giving its own instruction, because it makes the right of abandonment asserted in point one, depend upon, whether the non-performance was the moving cause, or motive of the exercise of this right.

3rd. The court erred in giving the instruction asked in behalf of the defendant in error, because there is no evidence of any understanding, that Skidmore, should pay the rent, to the bank, but the contrary is proved, by the evidence produced, on behalf of Moffitt himself.

See the testimony of Sweatland, p. 13 and 14 of record.

Also that of Clements, pages 18, 19 and 20 of record; also exhibit "C." being the understanding of Moffitt himself, or as by himself, reduced to writing for Skidmore to sign with himself, who had signed it.

The nature of the rent, also precludes the idea being in flour, &c.

4th. The plaintiffs in error became liable to an immediate ejectment to the bank, after its notice and exclusive claim to the property, and therefore, had the same right to quit voluntarily, as the bank had, to eject them by suit, and such a quitting would be a defence to the claim of Moffitt for any rent thereafter, as would an eviction by process of court under a paramount title. 15 Pick. Rep. p. 147; 1 Metcalf's Rep. p. 494.

1 Vol. Smith's Leading cases, p. 310 (side paging;) Moss vs. Gillmore, with English and American notes.

The verdict is grossly against evidence See evidence of Skidmore, p. 30.

### HILL, for defendant.

1st. The defendants below, asked an instruction, presenting this case to the jury, on the question, whether the plaintiff let to defendants, on the condition that he would settle the claims of the bank, on the mortgage; and the court gave that instruction with a slight qualification; and also gave the exact converse of the defendants instruction, on which the jury found for the plaintiff. The jury could not have found a verdict for the plaintiff on the instructions, unless they believed that there was no such condition annexed to the lease, for Skidmore swore, that defendants left for that reason.

2nd. The defendants cannot object to the addition of the words to their instruction, "and Skidmore, the agent for defendants, left for that reason," because these were the very words used by Skidmore in his testimony, and the reasons assigned by him as defendants agent, for

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quitting the premises, so they have had the law declared by the court below, to correspond with their witness Skidmore's statement; and the finding of the jury only impeaches their witness, and gives them no ground for a new trial.

3rd. The parol statements prior to the conclusion of the contract, which was reduced to writing, are of no avail, and the condition set up by defendants is not in the case, upon the defendants own showing, in the supreme court, so the instruction of defendants in any form, was not admissible, for there was no condition legally proven, annexed to said contract of letting.

4th. A mortgagor in possession prior to forfeiture, has the legal seizin; 4 John R. 41. A mortgagee has not an estate in fee, but a *mere security for a debt*, and a discharge of the debt, even by parol, is a discharge of the mortgage, and evidence thereof, in ejectment would defeat the mortgagor; so a mortgagor *in possession*, is the *real owner*, until foreclosure. Id. by Kent. Ch. J. Richards vs. Simms, Ch. Rep. 90; 2 Burr. 969, Martin vs. Mowlen; Doug. 610 and 630, the King vs. St. Micheal; Doug. 455, Eaton vs. Jacques; 1 Hy. Blk. 117 note, Chinney vs. Blackburn; Doug. 114 Jackson vs. Vernon; 1 East. 288, the King vs. Inhab. of Edington; Steward vs. Waters, 1 Caines cases in Eng. 47.

5th. Until foreclosure or possession taken after forfeiture, the mortgage is a *chose in action*. 4 John. 43, and a mere pledge or lien, 6 John. 295; so that the wife of a mortgagor upon his death, is entitled to dower in the mortgaged premises previous to foreclosure. 7 John. 278; Runyan vs. Mercereau, 11 John. 534; Coles vs. Coles 15 John. 319; 9 Mo. 550; 10 Mo. 230; 2 Cow. 195, 230, 1, 1 Conn. 519; 5 Pick. 146; 6 Pick. 416, 19 John. 325; 7 Greenl. 41, 1 Day 93; 1 Caines Cas in En. 47; 7 Mass. 138; 9 Mas. 101; 16 Mass. 345, 5 Conn. 133; 1 Halst. 466.

6th. A lease by the mortgagor, subsequent to the mortgage is valid between him and the lessee, and as to all the world, except the mortgagee, after the forfeiture. Bowdoin ad. Bacon 22 Pick. Rep. 401; and the mortgagor is entitled to recover the rent. Smith's Lead Cas. vol. 1, p. 426; unless there is eviction by the mortgagor, or a surrender of the possession by the tenant to the mortgagee. Id. McKirchen vs. Hawley, 16 John. 289, is in point.

7th. The claim of the Bank on the mortgage, was no excuse for the abandonment by defendants, for they had agreed to pay the rents to the mortgagee for the benefit of the mortgagor in possession, who had the right thus to provide for the extinguishment of the mortgage, and if the defendants had attorned or delivered up the possession to the mortgagee, the plaintiff could have had an account for the whole rents and profits.

8th. There has been no demand of possession, nor for an attornment of defendants, to the mortgagee; the only demand was for rents, for money, and these the defendants had agreed to pay, or might have paid the bank, and failing to do so, use the demand of the mortgagee as an excuse for their own wrongful abandonment. The defendants were never disturbed or evicted, by the mortgagee, nor asked to attorn, nor have they attorned. The relation of landlord and tenant then existed until the end of the term, between plaintiffs and defendants, and the bank released even all claims for rent.

9th. The instructions of the court, based on defendant's testimony, put the case more favorably to the jury, for the defendants, than the law of the case would warrant; and the finding of the jury is conclusive of the facts, and cannot be disturbed.

The judgment, then should be affirmed.

RYLAND, Judge, delivered the opinion of the court.

The only point necessary for this court to examine, consists in the giving and refusing instructions by the court below. These instructions are embodied in the above statement. The one asked for, by the defendants below and which was refused by the court, in the words as

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asked, but which was given with but a small additional alteration, and the one which the court gave on behalf of the plaintiff below.

The instruction given by the court, is in the following words.

"If the jury believe from the evidence, that Skidmore made it a condition with Moffitt before he would bargain with him for the use of the mill, that Moffitt should satisfy the claim of the bank, so that the bank would release its claim, and that Moffitt did not do it, as agreed, [and that in consequence of such failure, Skidmore quit the premises,] then the most that the said Moffitt can claim of the defendants, is for the time they used the mill, and if the jury find this greater, than the defendants have paid, their verdict should be for the excess, if equal only, or less than their verdict should be for the defendants."

The defendants asked this instruction without the words above inclosed in brackets, which the court refused in that form, but gave as above set forth. This is the chief ground of complaint, by the plaintiffs in error. The testimony of Skidmore expressly states, that in consequence of Moffitt's failing to satisfy the bank, he closed the mill and quit the premises. The instruction therefore brought the truth of this statement directly before the jury—suppose such had been the condition of this letting, and that Moffitt had failed to pay the bank, but yet the defendants continued to occupy the mill until the expiration of the six months, and after this, that Moffitt had fully paid the bank, and the defendants never had been called on for the money by the bank, can they in good conscience set up Moffitt's failure to satisfy the bank, during their lease, which failure caused them no inconvenience, no injury, as a valid defence to the claim of Moffitt against them for their rent?

I find no fault, with the instruction as given by the court; and indeed the difference between the one asked for, and the one given, is so technical, that the jury may not have been fully aware of it. The other instruction is merely the converse of the one given. I am satisfied, that these instructions fairly put the merits of this controversy before the jury and they having found their verdict thereon, the court below committed no error in refusing to set the same aside and grant a new trial.

The judgment of the court below is therefore affirmed. Napton, J. concurring herein.



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Personal property which is necessarily connected with the free-hold by a tenant, for the purpose of carrying on the trade or business for which it has been demised to him, (such as a hydraulic press, used by a tallow chandler, let into the ground and walled up with solid masonry, the wooden portion of which was nailed partly to the floor and partly to the rafters of the building) does not thereby "attach" to the realty, but remains the chattel of the out-going tenant, and may be removed by him at the termination of his lease.

## APPEAL FROM ST. LOUIS CIRCUIT COURT.

## STATEMENT OF THE CASE.

This was an action of trover brought by Watkins against J & W. Finney for a boiler and fixtures, one hydraulic press with pumps complete, and other property, (all of which was the implements used in a candle factory in the manufacture of candles, and some materials of which candles were to be made.) Plea, not guilty. At the trial, the plaintiff offered in evidence a paper purporting to be a bill of sale by Wm. H. Saunders to the plaintiff, of all *his, Saunders, right, title and interest in his candle factory*, one boiler and fixtures, one hydraulic press with pumps complete, and other specified property, and whatsoever else about the factory that is necessary to carry on the candle making business, the empty carboys which held vitriol included, having first called as a witness, George A. Hyde, who testified that the paper was acknowledged before him the ninth day of June, 1842, by Wm. H. Saunders, that it was William H. Saunders' act and deed; that he did not know Saunders' signature; did not see him sign the paper, nor did he sign it as a witness to the signature of Saunders. The paper purported to have been acknowledged as the act and deed of Saunders, before Hyde as a justice of the peace, and had been recorded in St. Louis county. The defendants objected to the admission of the paper in evidence, because the signature of Saunders thereto was not proved, because the execution of the same was not proved, and because it was not authenticated properly, but the court admitted it in evidence, to which the defendants excepted. Subsequently, another witness proved the signature of Saunders.

The plaintiff then proved that Saunders and William M. Hague were partners in the candle factory, and gave evidence tending to prove that Hague had assented to the sale by Saunders to Watkins, and had agreed to work in the factory for Watkins; that Saunders had delivered the key of the factory to plaintiff. That Saunders shortly after ran away, and Hague delivered the factory and property in it to John & Wm Finney, and John Lee and plaintiff demanded the property (mentioned in the bill of sale of Saunders) and other bills from William Finney; that he refused to give it up. It was proved that the fee of the land, where the factory was situated, belonged to J. & W. Finney, they having leased the same for 10 years to said Saunders & Hague, and that the property mentioned in the bill of sale of Saunders to Watkins was worth more than the amount alleged to have been paid by Watkins for it: that John and William Finney were partners. The bill of sale bore date the ninth of June, 1842, and the plaintiffs gave in evidence an agreement of Saunders of the same date, that he would pay rent to Watkins from that time to the first of July, 1842.

The defendants then proved that the firm of Saunders & Hague was indebted to them, and that on the 2d July, 1842, said Hague conveyed to John Finney, William Finney and John Lee, composing the firm of Finney, Lee & Co., by bill of sale of that date, the property at the factory in consideration of the indebtedness of Saunders & Hague to J. & W. Finney, and the liabilities assumed by William Finney, and also by John Lee for Saunders & Hague. The de-

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defendants also proved that the two Finneys and John Lee were partners under the name of Finney, Lee & Co., and had a running account with Saunders & Hague, having repeatedly supplied them with stock for the manufacture of candles, and bought candles of them, and sold candles for them.

The defendants then offered in evidence the deposition of said John Lee on their behalf, the same being material to them, but the plaintiff objected to the same on the ground that said Lee was incompetent as a witness for defendants, on the ground, as he assumed, of interest; and the court excluded the said deposition on the said ground, to which the defendants excepted. The defendants then proved that the Hydraulic press (part of the property sued for) was put into a hole dug into the ground and walled up with solid masonry; that the bottom of the cylinder rested on flanges on the stone wall even with the floor, but the press was not otherwise attached to the wall than by resting on it—flanges placed in the wall—and that the part of the press around the cylinder was of plank and nailed to the floor, and braces were nailed to the press, and also to the rafters of the building to steady the press. The press was braced, braces nailed to the press, and plank could be taken down, taken away; could take the braces down by drawing out the nails, then lift out the cylinder. 3 or 4 braces were slightly nailed to the rafters in one end and to the press by the other. It would not injure the building to take the braces down; the braces were merely to hold the press steady. That John Finney paid for putting up the press partly in 1841, and partly next spring; the work had been done for Saunders & Hague, and they were to have paid for it. There was a hat closet around the press, lathed and plastered, and fastened to the floor and ceiling, so that the press could not be removed without tearing it away.

Defendants also gave evidence tending to prove that Hague did not assent to the sale by Saunders to plaintiff, and did not know of such sale.

The plaintiff then gave in evidence an agreement proved to be in the hand-writing of John Finney, of Finney, Lee & Co., with Hague, referring to the conveyance by Hague to Finney, Lee & Co., and binding them to return the premises to Hague when the stock on hand was manufactured, provided it should be sufficient to pay the indebtedness to them after paying all expenses; or if the stock manufactured should not repay them, then Hague might make an arrangement for carrying on the business with them, or with any other person, by securing the balance due them; and also agreeing to pay Hague at the rate of fifty dollars per month for manufacturing the stock then on hand.

The court, upon motion of the plaintiff, gave to the jury the following instructions:

If the jury find from the evidence that Saunders & Hague, or either of them, were the owners of the articles of personal property sued for in this action, or any of them, and that they were sold and delivered by the said owner or owners to the plaintiff for valuable consideration paid, or to be paid, that said purchase was made by the plaintiff bona fide, honestly, and that afterwards and before the commencement of this suit, defendants got possession of the same articles without the consent of the plaintiff, and retained them, and refused or neglected to deliver them to him, notwithstanding he demanded the same from them, then they will find for the plaintiff.

2d. That if the jury find for the plaintiff, the measure of damages will be the value of the articles of personal property belonging to the plaintiff, taken and held by the defendants at the time of the taking, with interest thereon from that date.

3rd. That the hydraulic press sued for in this action with its appurtenances, is in its nature personal property, and may be sued for in an action of trover, and recovered when a right of recovery is established, notwithstanding the jury may find that it was set up for use on a solid foundation of masonry, and supported by flanges resting on masonry, and by braces nailed to the rafters of the building.

4th. That if Saunders, or Saunders & Hague, were tenants of defendants, and placed the said hydraulic press on the leased premises, and used the same for the purpose of carrying on a candle factory, and the trade of candlemakers, then the said press and appurtenances

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might be removed by said tenants, and belonged to them, notwithstanding it was supported on the foundation by flanges and also supported above by braces or other fastenings to the building, and is to be considered as personal property in this suit.

5th. That a sale by Saunders of personal effects and articles of the firm of Saunders & Hague to plaintiff, was sufficient to pass title thereof, if assented to by Hague, if such sale was made and assent were given.

6th. If Saunders sold the articles in question to plaintiff, gave the deed read in evidence to him, and Hague then or afterwards assented thereto, and the sale of the articles therein specified, then the title of them passed, although belonging to the firm of Saunders & Hague.

7th. That a resting upon the soil and freehold, or on masonry erected thereon, or an attachment thereto by braces in order to keep the machine firm, fastened with nails to the main building, is not necessarily such an annexation as makes the property a part of the freehold. And the court of its own motion, gave to the jury these instructions :

1. If the jury are satisfied from the evidence that the property, or any part of it, specified in the bill of sale from Saunders to Watkins, dated June 9th, 1842, belonged to a firm consisting of the said Saunders and Hague, then said bill of sale alone could not operate in law to convey to Watkins the title to such property ; inasmuch as it does not purport to have been executed by Saunders as the agent or in the name and behalf of said firm.

2. Although a sale by Saunders of the personal effects and stock of the firm of Saunders and Hague, with the consent and approbation of Hague, would bind the latter, yet the jury should be satisfied from the evidence, if such sale were made, that Hague assented thereto, otherwise he could not be bound thereby, nor could the plaintiff recover the partnership property from those to whom Hague may subsequently have conveyed and delivered them. To the giving of all which instructions, the defendants excepted.

The court also gave to the jury upon motion of the defendants the following instructions :

1. If the jury find from the evidence that the property for which this suit was brought, or any part of it belonged to the firm of Saunders and Hague, and that the plaintiff purchased only the right and title of Saunders thereto, and that Hague before the commencement of this suit had conveyed and delivered said property to John and William Finney and John Lee, in that case the plaintiff is not entitled to recover for such property.

2. If the jury find from the evidence that any part of the property mentioned in the declaration of this case, was let into and attached to the soil and freehold and had not been severed therefrom before the commencement of this suit, the plaintiff cannot recover for such property in this suit.

3. The jury are to judge what constitutes a letting into the soil and freehold, and an attachment thereto, under the instructions already given. And the defendants prayed the court to give to the jury the following instructions which the court refused to give, to which refusal the defendants excepted.

1st. That unless the jury find from the testimony that the plaintiff Watkins owned and possessed the property sued for, or some of it, and that the defendants or one of them, got possession of the same and wrongfully converted it to his or their own use, the jury ought to find for the defendants.

2. The bill of sale from Saunders to Watkins of the date of 9th of June 1842, and in evidence before the jury does not operate in law to convey to Watkins the title to any property which at the date of said bill of sale belonged to the firm of Saunders and Hague.

3. There is no evidence of a conversion of any property mentioned in plaintiffs declaration, by the defendant John Finney to his own use, and that the jury cannot find the said John Finney guilty, unless they find that he converted said property, or some of it, to his own use.

4. If the jury from the evidence that Saunders attempted to sell all the machinery, utensils and stock of the firm of Saunders and Hague, to plaintiff, so as to put an end to the business of the firm without the consent or approbation of his copartner, Hague, in such case said Saunders could not convey the title to the partnership property, to the plaintiff.

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There was a verdict for the plaintiff against the defendants for \$3817 07, and a notice for a new trial, which was overruled, and the defendants excepted.

### SPALDING for appellants.

1. The first instruction of defendants, refused by the court requests the court to tell the jury that they must find that Watkins owned and possessed the property sued for, or some of it, and that the defendants got possession and wrongfully converted it to their use, in order to find for plaintiff. This instruction is erroneous in these particulars.

1st. Because it uses the general words "owner," which might mislead and occasionally would, as in fact *ownership*, is not necessary to the action.

3 Stark Ev. 1482, title "trover," that a special property, and uses, and a temporary *interest* is all that is needed to sustain the action as bailees, carriers, pawnees, a borrower, &c., who are by no means "*owners*;" for by that word, something further, would be generally understood.

2nd. Nor was possession by plaintiff necessary to sustain the action, though both ownership and possession, are required by the instruction.

3 Stark Ev. 1482, 1483, 1488, that the action may be maintained by a person having only a special property, and no *possession*.

1 Chitty Plea. 150, property general or special, right of immediate possession, all that is needed.

2nd. The second instruction of defendants refused, calls on the court to say that the bill of sale of Saunders to Watkins did not operate to convey to him the title to any property, which at its date, belonged to the firm of Saunders & Hague.

1st. This was erroneous, for the proof was, that Hague concurred in the transaction and ratified the sale. If such were the fact, the instructions would have misled.

2nd. It was proved also, that Hague sold out his interest to Saunders, after the bill was made; or rather, approving of the bill of sale at the time, he afterwards sold all his claims on the concern of Saunders and Hague, to Saunders before this suit was brought.

3rd. The third instructions of defendants refused, asserts that John Finney one of the defendants, is not liable, as there is no evidence of any conversion of any of the property to his own use, and as he could not be liable without that evidence.

1st. That there was evidence, that John Finney converted the property, viz: the bill of sale of the disputed property to John Finney, Wm. Finney and John Lee, to secure among other things, a debt due to John and William Finney, and possession under it.

2nd. The receipt for said bill of sale, is signed by the firm of Finney, Lee & Co., composed of John Finney, Wm. Finney and John Lee, as it shows by reference to the bill of sale, and shows they (John Finney, one of them had got possession of the disputed property, and exercised dominion over it, and disposed of it for their own uses, and benefit; that is the firm of Finney, Lee & Co., John being one of them,) converted the property to their own use, and in part to secure a debt due to John and William Finney.

3rd. Mr. Divine, witness for plaintiffs, states respecting his working at the establishment, and says that they were weighing "some days before the Finneys came there." He is speaking of the possession taken under Hague's bill of sale, adverse to the plaintiffs title; and uses the plural, "Finneys." Also says "the Shids were there when the Finneys came," and again. "It was William and John Finney, they took possession from Hague." Had not helped Watkins along, before the "Finneys got there."

And if any demands were necessary before bringing suit, (which was not) a demand of one of the Finney's, was a demand of both.

1 Chitty Plea. 153, conversion may be, by *wrongful taking*, or *illegal assumption of ownership*, or *illegal using or misusing chattels*, or by *wrongful detentions*.

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In case of wrongful taking, it is not necessary to make demands.

1 Chitty Plea. 153, nor is demand necessary when there is wrongful assumption of the right of disposing of goods.

Ibid. p. 154-5, demands and refusal is necessary only, where trespass or wrongful assumption of ownership is not proved.

Collin on partnership 252, partners like individuals, are liable for the negligence, &c., of their servants; and if one of the partners act he is considered in this instance as the servant of the rest."

Ibid. 253, "upon the same principle partners may be sued in an action of "trover," although there was no joint conversion in point of fact."

John Finney, was, as there is evidence tending to show assenting at least, to the conversion if not personally acting in it.

Story on partnership 257, sec. 166, facts not committed in course of partnership business, are not to be answered for, by partnership, unless assented to. "But costs may arise in the course of the business of the partnership, for which all the partners will be liable, although the act may not in fact, have been assented to, by all the partners," as if, one of a firm, sell goods, consigned to them, in violation of instructions, "all the partners would be liable, in *trover*." Ibid. sec. 168.

The third, fourth and seventh instructions of plaintiff, relate to the condition of the property, and the laws of fixtures, and the law was rightly declared therein. They assert first, that the hydraulic press, being personalty in its character, might be sued for, as personalty, where a right of recovery is established, notwithstanding, it was supported by flanges resting on masonry, and by braces nailed to the rafters of the building: 2nd. and that tenants that erect or set up machinery, to carry on their trade on leased premises, do not thereby, of course lose the same, but the same remains theirs, and is personalty, as between them and the landlord; and third, that a resting upon the soil or on masonry, or on attachment thereto, by braces, in order to keep the machine firm, fastening with nails to the main building, is not necessarily such annexation as makes the property a part of the freehold.

49 Law Libr. (Grady's law of fixtures 4,) Buller's Nisi Prius 34; Culling vs. Tufferal 3 East. 38; Elves vs. Maw, a case of annexation making it realty, but Lord Ellenborough, recognizes doctrine of Buller, that a house resting on blocks, and pattens lying on the ground, and not fixed in it might be removed by tenant.

2 Bam. and Al. 165, Davis and al vs. Jones and al; parts of a machine had been put, by tenant during term, and could be removed without injury to the other parts of the machine or building; held to be goods and chattels of outgoing tenant, and *trover* would lie for them, that as between landlords and tenants, they were chattels, &c., though they were attached to the building.

B. and Ad. 161, (20 E. C. L.) a mill resting on foundation of masonry, is chattel.

4 Ad. and Ellis, 884, (31 E. C. L.) Wansbrough et al vs. Maton, tenant erected wooden barn on foundation of masonry, the foundation being let into the ground; it rested on the foundation, tenant may remove it, and maintain *trover* for it. This was an action of outgoing tenant, against the landlord, who had leased the premises, comprehending house to another tenant.

4. B. et al. 206, (6 E. C. L.) "Trespass for taking goods chattels and effects," will lie for certain fixtures &c.

5. Mees, and Wels. 175, Shem vs. Richie, as to moving of wood "fixtures;" and that houses and other edifices placed on and not let in to the freehold, are recoverable in *trover*.

6. Greenl, 452 Agden vs. Howard; 1 Fairfee 429, 2 do 371, 3 do 162, dwelling houses and saw mills erected on land of another, under sanction of the relation of landlord and tenant, or express license of owner of land, are property of the builder, and are not considered as becoming part of the freehold, and *trover* will lie for them.



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Gradys law of fixtures 8, (49 law, Libr) also p. 11, as to landlord and tenant, and p. 18, as to trade, and p. 32, and 52, 55, 60, 83.

Gibbons on law of fixtures (11 law, Libr,) p. 15 & 16, as to what is, "fixtures," p. 22, 23, 24, 25, as to trade fixtures; and page 19 and 20, that though fastened different ways, still are chattels, as machinery fixed to floor or otherwise by bolts or screws, and carpets, by nails.

1. Mis. Rep. 361, Hunt vs. Mullanphy annexations to freehold for trade and manufacture are of personal character, a kettle or boiler, put up in a tannery with brick and mortar, not a fixture unless something else to show it was so intended.

1. Mis. Rep. 442 Philipson vs. Mullanphy. This was lease of *lot, brewery*, and utensils; so that the question did not arise what the tenant generally may remove; but the case turned on the words of the lease. But the court makes general remarks on the subject that in such cases the lessee is the principal and the means of carrying on his trade, the accessories.

3. Mis. Rep. 149 (207) Burk vs. Baxter, still set up in furnaces in the usual manner for making whiskey are not fixtures but personal property.

The Finneys entered as landlords, as the lease was verbal, for 10 years, it was in effect a lease at will and they (Finneys) entered claiming the right to have possession.

The possession of the Finneys was also this possession of Lee; It was the possession of two of co-trustees with the consent of the third. A recovery against the two by trover, on a paramount title, *will* be conclusive on the third, upon principle. It is undoubtedly binding on the two sued. How can the third, one sue for it? He cannot sue alone, for by rules of law, he was bound to sue in the name of all three. He must then go into chancery and file his bill, and can he get any relief, when his co-trustees have been compelled to pay the value of the property and could not help it? Will he be permitted to recover of them; or would not chancery hold that the recovery against the *two* (Finneys) as it was by title paramount, is to stand and they (the Finneys) to be reimbursed before the other, Lee, can get his debt? 1 Hill's Reports 99, Moak vs. Johnson.

### GEYER & DAYTON for appellee.

I. That the deposition of Lee was properly excluded.

The deposition not being preserved in the bill of exceptions, every thing which bore upon Lee's competency in the court below, is not before this court, this court ought therefore to presume that the witness was shown to be incompetent, whether such incompetency does or does not appear by the record, as presented.

But the record does show that the witness was interested in the event of the suit. A recovery against the Finneys would deprive the witness of the benefit of the conveyance, made to the three, for the benefit of all.

Paull vs. Mackey 3 Watts 110.

Harrison vs. Vollance, 1 Bingham 38, found in 8th Eng. com. law Reports page 239.

Dimond vs. McDowell, 7 Watts, 510.

Saunders on pleading and evidence, 2 vol. 942, and seq.

### Judge BIRCH delivered the opinion of the court.

We deem it scarcely neccessary to refer to authority, in order to determine that the property in question was personal, and properly the subject of suit in the form of action adopted by the plaintiff. The liberal and least erring rule of modern jurists, namely, that whatever is necessarily connected with the freehold by the tenant, for the purpose

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of carrying on the trade or business for which it has been demised to him, does *not* thereby "attach" to the realty, but remains the chattel or fixture of the out-going *tenant* is believed to apply too obviously and plainly to this transaction, to need either elaboration or elucidation. Upon this view, therefore, of the law and the testimony, the circuit court might have proceeded even farther than it did in the aggregate bearing of its instructions for the plaintiff, and yet have remained exempt from error upon that score.

The right of the plaintiff to the property sued for seems also to have been properly found by the jury, under such instructions and such testimony as the defendants, at least, cannot complain of. To say nothing of the acknowledgement before the justice, and the recording of the conveyance on the same day, except that we perceive no objection that it was sent to the jury for at least what it was worth, the testimony of Mathews (called subsequently) could leave no reasonable doubt upon the minds of the jury that the bill of sale was the act and deed of Saunders; and it being also in testimony by other witnesses that the property was contemporaneously delivered to the plaintiff by Saunders, and that the sale was contemporaneously assented to by Hague, the title of Watkins may well have been deemed complete and conclusive against the arrangement subsequently made between the defendants and Hague, and this, whether there had been a partnership between Saunders and himself or not.

It will be perceived that we have reached the foregoing conclusions irrespective of the supposed testimony of Lee, whose depositions, for aught that appears to the contrary, was rightfully excluded from the jury. His interest, even as apparent upon the face of the transfer from Hague to the Finneys would seem of itself to disqualify him from testifying generally, but whether or not, the record is not so presented here as that this court can see that the court below erred in excluding his testimony. As neither the deposition itself, nor the substance of it, is preserved in the bill of exceptions, we cannot know either what facts it essayed to establish, or what admissions (of interest, possibly,) it may have of itself contained; and the legal presumption being in favor of the correctness of such adjudications as are predicated upon inspection in the court below, we cannot, unless that presumption be rebutted by a presentation of all the facts upon which it may have proceeded, either review or reverse its judgment. The duty of showing this, it need scarcely be added, devolves upon the party complaining.

The question whether the Finneys were in the possession and wrong-

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ful retention of the plaintiff's property, seems also to have been properly committed to the jury under the instructions of the court, the additional instructions asked by the defendants being, to say the least of them, ambiguous or unnecessary. The whole case, in short, seems to have been conducted not only with legal fairness but with an apparent liberality towards the defendants, and we consequently perceive no reason for trying the case anew. The judgment of the circuit court is therefore affirmed.

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JOHN F. MENSE vs. ELIJAH McLEAN.

Where A had heard B say that he had an unrecorded deed for certain lands, it is sufficient to charge A, who subsequently purchased the lands, with actual notice of the title of B.

APPEAL FROM FRANKLIN CIRCUIT COURT.

CAMPBELL for appellant.

1st. The decision of the court purporting to be a final decree is not a decree in chancery, according to the rules and usages of a court of chancery, but is an imperfect and incorrect form of a judgment at law.

2nd. The entry in this cause purporting to be a final decree in chancery is erroneous, because it does not purport to be a final decree between any of the parties to the suit, except between the complainant and Elijah McLean, one of the defendants.

3d. The final decree is erroneous, because there is no decree either for or against three of the defendants, Tresdale, Miller and Vanderholly.

4th. The decree is erroneous, because it does not determine or dispose of the whole matter of controversy as between all the parties to the suit.

5th. The decree is erroneous, because it gives judgment for costs in favor of McLean, one of the defendants; but makes no decision as to the costs incurred by the other defendants.

6th. The decree is erroneous because there was no verdict of a jury, no report of a commissioner, and no finding by the court on which to base the decree; nor does the decree state the facts of the case, nor the matters in controversy; nor does it state what disposition is made of the land and the title; but merely that the complainant take nothing by his bill.

7th. The circuit court erred in proceeding to render a final decree, when no answer to the bill had been made by two of the defendants.

8th. If the court had proceeded to make a final decree under the circumstances, it was man-

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first that the court could not do complete justice to all the parties, and if the bill was to be dismissed, it ought to have been without prejudice.

9th. The decree is erroneous, because it is rendered against the complainant, and in favor of McLean, one of the defendants, when from the testimony it appears that one witness proved that McLean had clear, actual and full notice of the sale of the premises in controversy, by Tresdale to McCoy, and this testimony is strongly corroborated by the testimony of Jeffries, Bay, Gaines, Cahill and McCoy. See Tucker's Commentaries, page 428, 446, 7, 506; 4 Dana Ky. Rep. pages 259, 263; 4 Mo. Reports 62, 70; 1 Littell Rep. 352; 4 Monroe 196; 2 J. J. Marshall, 180, 434; Earton's Equity, page 194, 5, 6, 7, 8, 9; 1st Harrison's Chancery 420, 439, 440.

COLE for appellee.

1st. It will be here insisted that the respondent, Elijah McLean, is a bona fide purchaser of the land in issue.

2nd. In other words, that at the time of his contract with Tresdale and Miller, he, McLean had neither a constructive notice, nor notice in fact of McCoy's and Callaway's contracts.

3rd. It will be contended furthermore, that in order to a recovery by complainant, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards performance on his part. 2 Story's Equity, 81, sec. 771. He who seeks equity, must do equity, ib. page 5.

4th. That the several purchasers took the original contract with Miller, *cum onere*, and unless complainant can show that he is in default, he cannot insist on a specific performance. 1 Maddock, Chy. 419.

5th. The payment of the purchase money in this case, was a condition precedent to the conveyance and after default the vendee is not entitled to a decree for specific performance. Hatch vs. Cobb, 4 John. Chy. Reports 559; Kempshall vs. Stone, 5 John. Chy. Rep. 193; 3 John. cases 60, Ballard vs. Walker.

6th. Neither Miller's bond to Tresdale, nor all of the subsequent assignments down to the Calaways inclusive, were legally of record, consequently imparted no notice to any person.

7th. John F. Mense, complainant, bought of one of the Callaways, after McLean's deed from Miller and wife, was legally of record. He was therefore a purchaser with notice of McLean's right, and that he was buying a law suit. Durrets vs. Hook, 8 M. R. 374.

8th. McLean's equity is superior to that of complainant, but if equal, the law must prevail.

9th. There is no evidence on the record, competent to overthrow the respective answers of McLean, and Tresdale. Bright's heirs vs. Haggin, Hardin's Rep. 536. Sullivan's heirs vs. Bates, 1 Littell Rep. 41, ib. page 43.

Judge BIRCH delivered the opinion of the court.

Having reached a conclusion respecting the question of notice which disposes of this case, the points which have been raised respecting the irregularity of the proceedings and the insufficiency of the decree need not be here considered.

In the case of Bartlett vs. Glascock and others, (4 Mo. 62,) it was substantially holden where A. had heard B. say he had an unrecorded deed for certain lands, it was sufficient to charge A., who subsequently purchased the land, with notice of the title of B. This opinion was ren-

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dered under the statute of 1825, which differs from the subsequent revisals in no respect which it is material here to consider; any sufficient notice, except *constructive* notice, being "*actual* notice."

The whole question, therefore, is, does the record show that McLean had such actual knowledge of the sale of Tresdale to McCoy as is contemplated by the statute? And this, being affirmed in the bill and denied by the answer, must of course be determined from the record of the testimony alone.

It is a rule in equity, and a good one that the denials in an answer must stand, unless contradicted by two witnesses, or one witness and strong corroborating circumstances. In this case, it will be seen that there is superadded to the positive, perspicuous and unimpeached testimony of Callaway an array of circumstantial testimony which it is impossible to resist. They need not be restated; the brief of the appellants counsel (now no more, and to whose memory it is deemed not inappropriate to pay this passing tribute of professional respect) having substantially set them forth.

The circuit court committed error, therefore, in dismissing the complainants bill, instead of decreeing that there be divested out of the defendant and all subsequent persons who may be parties or privies to this suit, any and all title, interest and estate which they may have, or claim to have, in or to the undivided half of the tract of 28 acres described in the bill of the complainant, and that the title thereto vest in the said complainant as from and after the period that it was assigned to him.

Judge Ryland concurring the decree will therefore be reversed, and one here entered conformably with this opinion.

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The owner of a judgment at law cannot assign to another person a part thereof, without the consent of the debtor.

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ERROR TO ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

Fairfield sued Love in trespass to the April term, 1846, of the St. Louis circuit court, and got judgment by default, on which damages were assessed at the same term for \$800, and execution issued therefor. The execution was returned "satisfied in full," by the sheriff acting under instructions from the plaintiff, Fairfield. This return was made Oct. 28, '46, the regular return day of said writ being the third Monday of November of that year.

On the 28th November, 1846, Field & Hall filed their motion to the St. Louis circuit court, to award execution on the said judgment and to set aside and vacate the entry of satisfaction on the execution by Fairfield, for the following reasons: "1st. That Field & Hall had an assignment of five hundred dollars by the said Fairfield before said satisfaction was entered on said execution. 2nd. That said defendant knew that the said Field & Hall had an interest in said judgment at the time he settled with Fairfield." This motion was called up for hearing on the same day it was filed. Judge Krum heard some evidence on that day, and held the matter up till January 9th, 1847, when he allowed the motion of Field & Hall, and gave judgment that the entry of satisfaction on said judgment, made by said plaintiff, be and the same is hereby vacated, so far as regards the claim of the said Field & Hall, to the amount of five hundred dollars, and that execution for the said sum of five hundred dollars issue on said judgment for the benefit of said Field & Hall, assignees of said judgment, to that amount. Love excepted, and filed his bill of exceptions, first moving for a re-hearing, which was refused.

It appears by the bill of exceptions that on Saturday the 28th day of November, 1846, when said cause was called for trial, the judge of the St. Louis circuit court (Judge Krum) asked if said Love were present; whereupon T. F. Gantt, the attorney of said Love, stated that he attended on the part of Love, who was present in court, having accidentally heard on the morning of that day that such a motion was pending, and had employed him (Gantt) to attend to it for him, and that as such counsel he objected to the irregularity of the proceedings, and particularly that the proper parties were not before the court, and could only be brought before the court by a bill in chancery. Love had been subpoenaed as a witness in the cause and was present. One John H. Deck was also present. The court decided to hear such facts as might be offered, and thereafter to decide upon the law and the facts of the case, to which decision Love excepted. Field and Hall then read an affidavit made by themselves, which they had filed with the motion. This affidavit was not read as evidence of the facts it recites, but laying a basis for the enquiry upon which this court was entering. It set out the judgment in favor of Fairfield, the assignment of 5-8ths thereof to Field & Hall, and knowledge of that assignment to Love; also that Love fraudulently procured Fairfield to enter satisfaction of said judgment, after being informed of the said assignment. Field & Hall then called as a witness John H. Deck, (who was unknown to the counsel of Love) who testified that some time in August, 1846, he had a conversation with Love about the judgment which Fairfield had obtained against him. That this conversation took place near the shop of Love, who is a blacksmith. That in this conversation Love stated that Field & Hall had an assignment of five hundred dollars of the said judgment. That deponent once had an interest in said judgment, which he had sold to Field & Hall, and that he had no interest at the time he testified.

S. M. Bowman testified that in October, '46, Fairfield and Love came to his office. They stated that they had been trying to settle. Fairfield said he was willing to settle with Love; for he did not believe that Love cut his waggon. Love said that he could settle with Fairfield, but that Field & Hall did not want to settle. Field & Hall were the attorneys of Fairfield. Fairfield stated that Field & Hall had an interest in the judgment, but he presumed he could settle with them, or fix it with them. The settlement between Fairfield and Love was made

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subsequently to this interview. On cross examination, Mr. Bowman said that nothing was said on this occasion of an "assignment" of any part of this judgment to Field & Hall, and witness, though a lawyer, did not know that there was an assignment. Field & Hall then read an instrument, purporting to be an assignment from Fairfield to Field & Hall of five hundred dollars of a judgment obtained against Love for eight hundred dollars, which instrument was dated May 24th, 1846, but it was admitted that it never had been filed with the papers of the cause, nor exhibited to Love until after the return of the execution in this cause.

Love by his counsel objected, first to the court taking any cognizance of the motion of Field & Hall at all; and secondly he objected that the evidence was not such as to warrant the interference of the court in their favor. The court took the matter under advisement on the Monday following this Saturday, to wit, on the 30th day of November, 1846, Love filed an affidavit to the effect that he was first informed of the pendency of the motion on the morning of the Saturday previous. That he was led, by information received from counsel, that the matter could not be disposed of by motion, and he was also informed that Field & Hall would have in attendance, and rely upon the evidence of Charles Collins, S. M. Bowman and Hugh Lackey, to prove that Love had notice of the assignment of the portion mentioned of the judgment to Field & Hall. That he relied upon the facts, that he never had heard of such assignment, and he knew that none of the persons named could testify that he had so heard or knew of it. That he was surprised by the production of Deck as a witness; that Deck was a person of infamous character. That affiant could prove by the testimony of numerous persons that said Deck was not a credible witness, and that he asked for an opportunity of trying this before a jury. Affiant denied positively ever having had such a conversation as Deck detailed in evidence, and denied that he ever heard before the return of the execution as satisfied; that Field & Hall had an assignment of any part of the judgment against him, or any lien upon, or separate interest therein; which affidavit was filed as aforesaid, and handed to the judge on the first or second day of December, 1846, and before the determination of the said motion. Afterwards one Murphy filed an affidavit, which it is not deemed important to notice. The court allowed the motion of said Field & Hall on the 9th day of January, 1847. Love filed a motion for a re-hearing, and assigned the following reasons:

1st. That he was surprised by the testimony of Deck, who was infamous, as could be proved.

2nd. Because there was no testimony that Love knew of the said assignment to Field and Hall.

3rd. and 4th. Because the allowance of said execution, is against law and evidence.

5th. Because all the parties interested, were not before the court.

6th. Because the court proceeded to enquire respecting the fact of notice to Love, of said assignment, without notice, service on Love. Without notice to the other parties, and without the intervention of a jury.

On the 8th day of February, when the said motion came on to be heard, the counsel of Love informed the court that since filing said motion, they had ascertained that Field had on the 29th day of May, 1846, taken to, and filed, in the office of the clerk of the circuit court for Madison county Illinois, a transcript of the record in this cause, and made an affidavit, for the purpose of attaching property, belonging to Love, in the State of Illinois, that the amount of said judgment was due from Love to Fairfield. And this the said Love then and there, offered to prove by competent testimony. But judge Krum refused to permit Love to try such evidence, and Love excepted. Love then offered evidence to prove, that in fact; he had no notice of the assignment from Fairfield to Field and Hall, before the return of the execution in this cause, but the court refused to hear such evidence, and Love excepted, Judge Krum refused to reconsider the cause, and overruled Love's motion for a rehearing, and Love excepted, and sued out this writ of error.

The above statement is correct except that Bowman testified, that when Love and Fairfield were at his office negotiating about a settlement, the office of Field & Hall, was on the same

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floor as witness's office, and excepts also, that at the time of the trial of the motion for a new trial, the defendant offered to prove that the transcript filed by Field, in Illinois, was accompanied by an affidavit made by *Fairfield*, and not by *Field*, as set forth in the foregoing statement.

POLK and GANTT, for plaintiff,

1st. The motion of Field and Hall (filed on the 28th November, 1846,) shows no cause or reason sufficient to justify the action of the court below. It does not show that Field and Hall had an assignment of any part of the judgment against Love; but only that they had from Fairfield "an assignment of five hundred dollars;" neither does it show that Love knew that Field and Hall had an assignment of said judgment, but only that he had been informed that they had "an interest in it," which is a very different thing.

2nd. While it is not denied that the assignee of a chose in action, will be protected against attacks of the assignor, done after the notice of the assignment, and detrimental to the interest of the assignee, it is denied that any one can be the assignee of *part* of a chose in action, or even of a negotiable instrument. See *Mandeville vs. Welch*, 5 Wheatons Reports p. 277, 28.; *Hawkins vs. Cardy* 1 see Raymonds Reports, 360; *Smith vs. Oldham*, 5 Mo. Doc. 483.

3rd. The action of the court below, was unwarranted by the evidence, given on the 28th November, 1846. And it was especially erroneous, after proceedings to the hearing of the testimony on the motion on that day, to refuse to allow to Love, permission afterwards, to disprove the statements of the witnesses by whose testimonies as he swears, he was surprised. The record shows, not a case of judicial discretion soundly exercised; but of arbitrary power so exerted as to work injustice; and this is a ground for reversing the judgment. *Moreland & Barnum vs. McDermott*, 10 Mo. Reps. 605.

4th. It is no where alleged in the reasons given and assigned, by Field & Hall for setting aside and vacating the entry of satisfaction, that only part of the judgment was paid by Love to Fairfield, or that Love did not pay to Fairfield, the full amount thereof. Nor is there in the evidence, any thing to contradict the fact that Love did pay to Fairfield the amount of the judgment in full. The fact must be regarded then as established; then Fairfield being the legal holder and owner of the judgment, and the only person to whom payment could be made. Love acted properly in paying the same to him; and as to any interest therein, of Field & Hall, Fairfield was in respect thereof, a trustee for them; but as for Love, Fairfield was the only person to whom he could properly make payment. *Reid vs. Fumival*, 1 Crompton & Masons Reps. 528.

5th. Neither does it appear by allegation or proof that Fairfield was insolvent, and that Field and Hall could not therefore, have any beneficial recourse against him.

6th. If Fairfield, and Field and Hall, were tenants in common of the judgment, which is the utmost that can be gathered from the allegations of Field & Hall, by the most indulgent construction, still Fairfield had power to release the rights of himself, and his co-tenants. *Lane vs. Dobyns*, 11 Mo. Rep. 105; 13 Johnsons Reps. 286, *Austin vs. Hall*; he did make this release, and it is valid.

7th. It is not decided in the case of *McLaughlin vs. Fairbanks, Lisle et al*, 8 Mo. Reps. 367, that the assignee of part of a chose in action, has any standing in a court of justice. That case went off on other grounds, and the authorities cited in support of such a position, do not in fact sustain it. 19 Johns. Reps. 95; Do. 344, 5 Johns. 193.

CROCKETT & BRIGGS for defendants.

1st. That the remedy by motion is the appropriate one in the case at bar. *Lampkin et al. vs.*

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Lisle & Edwards, 8 Mo. R. 367; Wardell vs. Eden, 2 John Cas, 121, 258; Buchee vs. Bank of N. Y., 1 John R. 530; Viners ab. title Judgment 597; Coleman and Carins, cases 137.

That Love had actual notice of the assignment, and his settlement with Fairfield was in fraud of the assignee; but if he had not actual notice, he had notice of such circumstances as should have put him on his guard, and this is sufficient. (See Bowmans's testimony.)

Anderson vs. Van Allen, 12 John. R. 393; Lodge vs. Simonton, 2 Pa. R. 439; Barnes vs. McClintrop, 3 Pa. R. 67; Peebles vs. Reading, 8 Leavy and R. 496; Laughlin vs. Fairbanks, &c., 8 Mo. R. 367; 1 Cowan 642.

Notice to agent or attorney is notice to the party. Haven vs. Stone, 15 Pick. 28, 32 52; Story on Agency, 131.

3d. That Love being present in court and represented by counsel, upon motion was called, waived the necessity for notice. Being in court, notice would have been superfluous. If not ready for trial, he should have moved for a continuance, which was not done. 8 Mo. R. 367; Graham's Practice, 508.

4th. That the affidavit filed by Love; after the cause had been submitted, in relation to the testimony of Deck, was accompanied by no notice for leave to introduce testimony, nor for a continuance, and was therefore properly disregarded by the court.

5th. The motion for a new trial, was properly overruled by the court, before the cause was decided. Love was aware of the facts alleged as impeaching the character of Deck, and should have moved for a continuance. He should not be allowed to take the chance of a decision in his favor and when decided against him, get the benefit of a second trial, and a new trial is never afterwards to allow a party to impeach a witness. Graham's Practice, 511; 1 Caines, 24; 3 John. R. 253; 5 John. R. 248; 14 John. 186.

Nor on the ground of cumulation testimony only. 8 John. 65, 15 John. 210; 9 Cowen, 266.

6th. Without the testimony of Deck, there was sufficient proof of notice, or what was equivalent to notice, to sustain the judgment of the court, and therefore a new trial ought not to have been granted, to allow defendant to impeach Deck.

7th. The newly discovered evidence offered by defendant on the hearing of the motion for a new trial, was properly rejected. 1st., because if allowed, it ought not to have varied the judgment of the court, and was not material to the issue. 2nd., because it was not accompanied by an affidavit of the defendant or any one else, but rested only on the statement of counsel.

8th. No one but Love, was entitled to notice of the motion, he being the only party interested in its decision, and having appeared to the motion without notice, he cannot complain of its omission.

RYLAND, Judge, delivered the opinion of the court:

The main question, from the above statement of the case, involves the right of a party to assign to another, a part of a judgment at law, can the payee of a chose in action, assign a part thereof to another, so as to effect the rights of the payer without his assent?

The validity of an assignment of a part of a judgment, is a question, which was not passed upon by this court, in the case of Laughlin vs. Lisle and Edwards (8 Mo. Rep. 369) because it was not made. It did not occur to the court, that there could be any doubt about the right to assign a part as well as the whole of a judgment.

The words "part" and "whole" being terms familiarly used in mathe-

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matics, the mind too readily assented to the power or right of him to assign a "part," who could legally assign the "whole," without considering the consequences and legal bearing of this question.

Upon examination we find it asserted in several cases, and especially in the case of *Mandeville vs. Welsh* (5 Whea. 277,) that a court of law will not interfere to protect a partial assignment of a chose in action. The reason for the distinction, as expressed by Judge Story in the case first cited is this : "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor ; since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignment, by which it may be broken into fragments, when he undertakes to pay an integral sum to his creditor, it is no part of his contract, that he shall be obliged to pay in fragments to any other persons."

A judgment so far as its assignable quality is concerned, is like any other chose in action. If the doctrine be applicable to the assignment of funds, either general or special, secured by simple contract specialty, negotiable or not negotiable, no reason is perceived why it does not extend to an assignment of a judgment. Every reason for the doctrine has as much application in the one case as in the other.

That such assignment may create equities between the immediate parties, the assignor and assignee is a matter not now important to enquire into : but the original debtor, must be a party consenting to such arrangement, before he can be affected by it : If a part of a judgment can be assigned, we know of no point at which its divisibility can be checked. It may be divided into numerous aliquot parts and each part, assigned to different individuals.

Would not this be a great inconvenience to the debtor, and one to which he cannot be subjected without his consent. We have not found any case in which a part of a judgment has been assigned, and therefore have found no decision directly upon the point. But is it not some evidence, that such a practice is not tolerated from the fact, that it seems not to have occurred ? It is remarkable, that no case can be found tolerating such an assignment. This circumstance alone is calculated to make against the claim.

Choses in action were not assignable at common law ; courts of equity however took charge of the interest of the assignee ; and then the courts of law, were forced to take notice of them.

But there is no policy in carrying the doctrine now held any further.

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Said transactions at best, tend to promote litigation, to increase costs and to prevent the amicable settlement of disputes between the parties originally only concerned. It is the interest of the State that litigation should not be encouraged.

The great tendency to promote champerty and maintenance; to prevent the parties themselves from making their own settlements of their disputes; to increase the number of suits, and to add to the burden of costs now sufficiently onerous already, have had much consideration with this court, in forcing us to the conclusion, that such partial assignment of a judgment, without the assent of the debtor shall not affect him.

From this view of the subject it will not be necessary for us to decide the question of notice of the assignment of part of the judgment to Messrs. Field and Hall, previous to the arrangement between Love and Fairfield by which the execution was ordered to be returned satisfied, and was so returned by the sheriff.

There is no pretence, that such assignment of a part of the judgment, was made by the consent of Love; indeed there is very great doubt whether he knew any thing of such assignment before himself and Fairfield settled.

The judgment of the circuit court sustaining the motion of Field and Hall "to award execution on the judgment against said defendant and to vacate the entry of satisfaction on the execution by Fairfield" is erroneous, and the said motion should have been overruled.

The judgment of the circuit court is therefore reversed, and this cause is remanded to said circuit court, with directions to overrule said motion.

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If an indictment fails to state the *time* when the offence was committed, it is bad.

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APPEAL FROM ST. LOUIS CRIMINAL COURT.

THOMPSON for appellant :

That no time is set forth when the alleged larceny was committed, and in this respect the record is substantially defective in its force.

An indictment without time is a pure anomaly in criminal pleadings. Wharton's criminal law, p. 72, says "time and place must be attached to every material fact averred. But the time of committing an offence except where the time enters into the nature of the offence may be laid on any day previous to the finding of the bill during the period within which it may be prosecuted."

Again, page 73: "It is requisite with some exception to name both the day and the year. The month without the year is insufficient. If the date be laid in blank so that it does not appear, if the offence was barred by limitation or not the judgment will be arrested." Express authority on this point also to be found, 1st Stewart's Ala. Rep. 318, State vs. Beckwith. 2d, Haywood p. 552, State vs. Roach.

Wharton again, p. 75: "If the fact be stated as to time or place with repugnancy or uncertainty the indictment will be bad." See also 2d Missouri Reports, 185, State vs. Hardwick; 3d do, 45, Jane, a slave vs. the State. Wharton again, p. 76: "Where time is limited for preferring an indictment the time laid should appear to be within the time so limited." If repugnancy or uncertainty as to time will vitiate an indictment, what shall we say of one who says nothing of time. This is beyond dispute *non est* in that respect. All crimes except those punishable with death or imprisonment in the penitentiary for life are subject to statutory limitation. See Rev. Stat., p. 895. Indictments in this State are held not defective on account of certain omissions. See Rev. Stat., p. 869. But nothing is said about leaving out time. See also as to time, Archibold's Crim. Pl., p. 37. "If no time or place be stated or if the time or place stated be uncertain or repugnant, the defendant may demur." It is true that after verdict, judgment in England cannot be arrested for a defect as to time. But this required a British stat. See Archibold, same page.

There is not a treatise on criminal law which I might not refer to, to show that time is essential in an indictment. In fact I regard the proposition as almost too plain for argument.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for grand larceny, by the grand jury of Saint Louis county, was tried and convicted. He thereupon made his motion in arrest of judgment, assigning as the reason in support of the motion, the insufficiency of the indictment in this, that there is no time alleged when the felony was committed. Upon looking into the record of the proceedings of the criminal court, I find that the indictment wholly omits to allege any time at which the offence was committed.

This is a fatal error; for which the court below should have sustained the motion in arrest. It is thought unnecessary to cite authorities upon this question. Every indictment must contain sufficient certainty in the criminal charge; and without averring sometime no such certainty can be found.

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The authorities cited by the defendants counsel fully sustain him in his view of the case. Let the judgment be reversed,

SIMON H. ALLEN, use of TODD and KRUM vs. ALEXANDER J. P. GARESCHE, Adm'r. of GEORGE ANSON, dec'd.

Where no instructions are given, or where those given are correct, the testimony must greatly preponderate against the finding of either the court or jury to warrant the interposition of the supreme court.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

This was a proceeding by Allen for the proving up and obtaining an allowance in the probate court for the county of St. Louis against the estate of George Anson deceased.

There was judgment for Allen in the probate court from which Garesche appealed to the circuit court for the county of St. Louis.

The claim of Allen as filed and presented in the probate court was as follows, to-wit:

Estate of George Anson deceased, to Simon H. Allen, to the use of Albert Todd and John M. Krum:

July 6, 1846. To 100 shares of stock in the Pell Mining Company sold to Charles Collins,.....	\$600
To 200 shares of stock in the Pell Mining Company, sold to S. M. Edgell & Co., as per contract,.....	1000
To this amount, being one half of note and interest paid to Presbury & Co., which note is the joint note of George Anson and S. H. Allen for \$365 74, dated May 30th, 1846, due in 30 days, and paid by S. H. Allen, Dec. 24th, 1846.....	\$200
Total.....	\$1,800

To this claim the adm'r. filed, before the probate court, the following set-off:

Simon H. Allen, to estate of Geo. Anson, debtor:

7 Nov., 1845. To amount loaned Mr. Allen per Mr. Stout.....	\$50 00
4 February, 1846. To amount received per Geo. Anson from Anson & Co.....	100 00
29 April, 1846. To amount borrowed of Geo. Anson.....	30 00
9 March, 1846. To amount paid by Anson to Guild & Dorwards on your order.....	100 00
“ “ half note of \$126 36 and interest.....	76 44

Total..... \$356 44

Upon the trial in circuit court, S. M. Edgell in behalf of plaintiff testified that Anson in his life time told him, witness, that the 100 shares charged in the above account belonged to Al-

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len; that he, Anson, sold same to Collins and was going to invest the proceeds of the sale thereof, made to Collins in real estate in the city of St. Louis for his own use, and that he got \$600 for it—that the name of Anson to a certain writing shown him was genuine—said writing was as follows to-wit:

"Sr. Louis, July 6th, 1846.

S. H. ALLEN, Esq., Sir:—I have sold to S. M. Edgell, 400 shares in the Pell Mining Co., half of which belongs to you, and I will account to you for the same in accordance with the contract with him.

Respectfully,

GEORGE ANSON."

Edgell further testified, that he advanced to Anson \$1,000 on said 400 shares, and that it was to be his own if he choose upon his paying \$1,000 more, that Anson said he was going to lay this money out in improvements for said company, but he had good reason to believe he did not. In support of the third item of said claims, the following note was produced by Allen, to wit:

"\$365, 74-100ths.

St. Louis, May 30th, 1846.

Thirty days after date, we promise to pay to the order of Presbury & Co., three hundred and sixty-five 74-100ths. dollars, for value received, negotiable and payable without defalcation or discount with interest from maturity at the rate of ten per cent, per annum.

GEO. ANSON.

S. H. ALLEN."

The signatures were proved by Edgell.

For the defence, it was proved that said Allen and Anson, from about October, 1845, to Sept., 1846, (when Anson died,) were partners in certain lease hold property in Hardin county Illinois, with lead mines thereon, and in the manufacture thereof, and the sale of merchandize there. That until January, 1846, the partnership style was "Anson & Co.," that then the business was formed into a joint stock company, converting all the property into stock, dividing it into shares, investing the title in trustees, and organizing the company with a President, Vice President, Secretary, Treasurer and Board of Directors. The company was called the "Pell Mining Company." Anson and Allen with others, whom the witness Edgell did not know, owned shares in said stock. The defendant, to prove his set off, produced certain writings as follows, to wit:

"Mr. GEO. ANSON, Dear Sir:—

Pleas pay to Messrs. Guild & Domart, one hundred dollars, and I will settle the same on my return.

Your ob't. serv't,

S. H. ALLEN.

St. Louis, March 9, 1846."

"Borrowed and received of Geo. Anson, thirty dollars for value received, payable on demand.

S. H. ALLEN.

April 29, 1846."

Rec'd. of Messrs. Geo. Anson & Co., one hundred dollars on acc. of Geo. Anson.

S. H. ALLEN.

St. Louis, February 4th, 1846."

"PELL MINES, HARDEN Co., January 24, 1846.

Sixty days after date for value received, we promise to pay to Vermont Allen or order one hundred and twenty-six 36-100ths. dollars, without defalcation or discount \$126,36.

GEO. A. { Sur names
S. H. " } torn off.

"S. H. ALLEN,

To Pell Mining Co.,

DR.

Cash rec'd. of S. M. Edgell..... \$500 00

For premium on same..... 4 75

Total..... \$504 75

S. H. ALLEN, use of TODD & KRUM, vs. ALEX. J. P. GARESCHE adm'r. of GEORGE ANSON dec'd.

CR.

By cash paid Kenedy and Field.....	\$ 18 00
" " delivered Geo. H. Peck.....	400 00
" " paid Geo. L. Fleyer.....	70 00
" Expense.....	15 00 \$503 00
Balance.....	\$1 75"

"ROSE CLAIR, HARDEN CO. ILL., Nov. 15, 1845.

MR. VERMONT ALLEN, Dear Sir:—

In consideration of a lease expected to us by you this day, we hereby, agree to advance your proposition of money to open and carry on the operations of the Pell Mining Company.

Respectfully,

GEO. ANSON.

SIMON H. ALLEN."

No evidence was introduced on either side, to show any settlement or account between the parties as partners.

The signatures to the above writings were proved.

This was all the evidence in substance.

At the request of Allen, the court declared the law to be.

1. "The plaintiff asks the court to declare the law to be, that if the claims presented for allowance in this case by the plaintiff or any of them, are individual between said plaintiff and Anson, then the fact that Allen and Anson having been in partnership with others, is no defence to such claims." The court of its own motion declared the law to be as follows, to wit:

2. "But if not individual as aforesaid, but in effect partnership; that is to say, if they grew out of and are connected with the opening and establishing the Pell mining company, or the carrying on and management of its business affairs, and the plaintiff and intestate therein were jointly interested, and the affairs of said concern are not settled up and closed, but are still open, the plaintiff is not entitled to recover in this case.

To this the plaintiff duly excepted.

The plaintiff duly moved for a new trial for these reasons:

1. Because the verdict is against evidence.
2. Because the court erred in its declaration of the law contained in instruction numbered "2." The court refused to grant the motion, to which the plaintiff excepted, and appealed to this court.

And to reverse said judgment assigns the following errors:

1st. That said circuit court erred in declaring the law upon the evidence in this case.
2nd. That the court erred in refusing to declare the law without qualifications as prayed for by plaintiff.
3rd. That said court erred in overruling the plaintiff's motion for a new trial.
4th. That the court erred in rendering judgment for defendant.

TODD & KRUM for plaintiff.

The only questions presented on the record in this case, is

1st. Whether the court erred in the instruction or declaration of law by the court.
2nd. Whether the court erred in refusing to set aside the verdict and grant a new trial.

The plaintiff in error insists that the instruction or declaration of law of the court below was erroneous, because there was no evidence proving or tending to prove that the claim of the plaintiff, or any part of it, was connected with or grew out of the co-partnership of Anson & Co., or the Pell mining company, or the carrying on and management of the business affairs of said company.

S. H. ALLEN, vs. of TODD & KRUM vs. ALEX. J. P. GARESCHÉ, adm'r. of GEORGE ANSON, dec'd.

The evidence in the case closely shows the liabilities which go to make up the claim of the plaintiff were individual and not connected with or growing out of the co-partnership existing between plaintiff and defendant's intestate, and the set-off was also individual. The finding of the court, therefore, should have been for plaintiff, and the court below should have set aside the verdict.

RYLAND, Judge, delivered the opinion of the court.

The main question in this case, involves the existence of the partnership between the plaintiff, Allen, and the intestate, Anson, and the accruing of the indebtedness of Anson to said Allen on the partnership transactions.

Upon a careful examination of the facts set forth in the above statement (and the statement is warranted by the bill of exceptions) I have my serious doubts as to this being a partnership transaction, but the court below having found from the evidence such to be the case; and not being myself entirely satisfied to the contrary: I am unwilling to disturb that finding:

In reviewing verdicts of juries or the finding of facts by a court, if there be contradictory evidence, or if there be evidence tending to establish facts that might induce a finding by a court or jury for either one of the parties, or that might leave a doubt for which party they should find; this court in all such cases will refuse to interfere, by granting a new trial, if there be no error in law conducing to such verdict. If there be no improper instructions given, or if there be no instructions given, then the testimony must greatly preponderate against the finding, to warrant the interposition of this court, especially when the court, below, who heard the testimony, who saw the witnesses, who had all the facts fully before it, both as regards matter and manner, has refused to grant a new trial.

The question with us is not whether we would have given such a verdict, not whether we are satisfied with such finding, but whether there is evidence which may support or which will warrant such finding. We find no fault with the declaration of the court below, as to the law.

The court gave the proper instruction as asked for by the plaintiff, and also the instructor, of its own motion, sets forth the law correctly. All that the plaintiff can complain of is the improvident finding of the court, a jury might have found otherwise, and I should have been just as well satisfied; but still I must decline to interfere with the present finding, for the reasons above set forth. The other Judges concurring, the judgment of the court below is affirmed.

LEWIS D. MARTIN & WIFE vs. SAMUEL HENLEY.

LEWIS D. MARTIN & WIFE vs. SAMUEL HENLEY.

1. A party cannot be compelled to take a non-suit.
2. In order to correct an error of the circuit court in improperly granting a new trial, the party complaining should tender his bill of exceptions, and abandon the case at that point.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of detinue brought by the plaintiffs to recover a negro boy.

To this the defendant filed two pleas.

1st. Non detinue.

2nd. That the negro boy was not the property of the plaintiffs.

On the trial of this cause, Mrs. Williams testified that Elizabeth Martin, one of the plaintiffs, was her grand child, and that the negro boy in question was the child of a negro girl named Eliza, a slave, which she had given to the said Ann Elizabeth, when she (Ann Elizabeth) was a little girl, in Virginia; that Eliza was deponent's own slave at the time she gave her to Ann Elizabeth; that she requested her son, Walter Williams, the father of Ann Elizabeth, to take care of Eliza until Ann should arrive at an age to require her services; that her son Walter Williams removed from Virginia to Missouri in 1829; and the witness also removed to Missouri in 1830, and made Walter Williams' house her home; that when Walter Williams left Virginia she told him that he might bring Eliza, the mother of the boy in question, with him, to nurse one of his children, but upon the condition that Ann Elizabeth was to take her as soon as she was old enough to need her services, and with the understanding that Walter Williams should, at the proper time, deliver said negro boy to said Ann Elizabeth. Witness requested Walter Williams to have a deed drawn from her conveying said negro girl, Eliza, to said Ann Elizabeth, which he promised to do; and only a few days before his death, he promised the next time he should go to town he would have the deed prepared, but he died, and it was neglected. Mrs. Williams further testified that Walter Williams never claimed said negro girl as his property, and that she told his administrator not to inventory said girl Eliza as the property of said Walter Williams. The witness further said that she raised said Ann Elizabeth from the time she was months old.

This testimony was corroborated by the testimony of other witnesses. The defendant offered no testimony on his part.

The court then, at the instance of defendant's counsel, gave the following instructions:

"The statement of the plaintiff's witness, that he had hired out the slave sued for from the defendant, as administrator of Walter Williams, is evidence that the defendant had possession of said slave as administrator of said Williams.

"Though the jury should believe from the evidence, that Mrs. Williams prohibited the administrator of Walter Williams from taking possession of or inventoring said slave, such prohibition does not have any effect to dispense with a demand on the part of said Elizabeth Martin or her husband."

Which were excepted to by the plaintiffs.

The plaintiffs then asked the court to instruct the jury,

1. "That if the jury believe from the evidence that Walter Williams, the defendant intestate, never claimed the negro girl Eliza, the mother of Dick, but admitted the same to belong to Elizabeth, now wife of Lewis D. Martin, and promised to deliver said slave to her, whenever required, they will find for the plaintiffs.

LEWIS D MARTIN & WIFE vs. SAMUEL HENLEY.

2. That if the jury believe from the evidence that the defendant, Samuel Henley, had a demand made on him for the negro boy Dick, by the plaintiff before the commencement of this suit, and at the time he, the defendant, induced the plaintiffs to believe he had the negro boy Dick in his possession, and thereby induced the plaintiffs to bring this suit for the same, he is liable therefor, although it shall appear he did not have the actual possession of said slave.

3. That the defendant could only acquire such title in the slave, as the intestate Walter Williams had, at the time of his death.

4. That the possession anterior to the suit in the defendant, is a sufficient possession for the action of detinue, to be maintained upon, unless said possession was taken from defendant by legal steps.

5. That if the jury find from the evidence that Henly took possession of the slave in question, and hired him out previous to the commencement of this suit, and that he is still so hired that the possession is yet in legal contemplation, in defendant.

6. That if they find from the evidence, that Eliza, the mother of the slave, was given by the grand mother to Ann Elizabeth Williams, now wife of Lewis D. Martin, and one of the plaintiffs in this suit, and that her issue was the slave in question, that said issue is as much the property of said Ann Elizabeth as was the mother of said slave in question.

7. If the jury believe from the evidence that the grand mother of Ann Elizabeth Williams, gave the mother of the slave in question to the said Ann Elizabeth in Virginia, and permitted her son Walter Williams to take the mother to Missouri, for a nurse with the express understanding that she was the property of the said Ann Elizabeth, and without limiting the time that the said Walter was to keep possession, then the said mother and her issue were the property of the said Ann Elizabeth, and she had a right to the possession as soon as Walter Williams, deceased.

8. If the jury find from the evidence that the mother of the slave in question was given to Ann Elizabeth Williams, the wife of Lewis D. Martin, and one of the plaintiffs in this suit, and that the possession of Walter Williams deceased, was a mere loan of said mother until said donee was of sufficient age to need said slave, and without any specific time agreed upon for the keeping of the said mother of the slave in question, that the plaintiff had a right to the possession at the time they demanded it, and at any time after the death of said Walter Williams.

The instructions asked for by the plaintiff were all refused, to which the plaintiffs excepted.

The cause being submitted to the jury, they found for the plaintiffs; whereupon the defendant moved for a new trial, which was granted, to which the plaintiffs excepted, and filed their bill of exceptions, and stated that they would abide the decision of the supreme court on the point made, but would not take a voluntary non-suit.

At a subsequent term of the court, this case was called for trial, when the counsel for the plaintiffs stated that the plaintiffs intended to take the case as it stood to the supreme court, and declined going to trial, whereupon the court directed a non-suit.

A motion was made to set aside the non-suit, on the ground that the case was improperly called for trial, and because the court compelled the plaintiffs to become non-suited. This motion was overruled, and the case is brought here by writ of error.

LESLIE & LORD for plaintiffs.

1. The court erred in granting a new trial in this case. The slave for which the action was brought was proved to be the property of Mrs. Martin, and so the jury found, and their verdict should not have been disturbed.

2. The improper granting of a new trial, is error. *Johnson vs. Strader*, 3 Mo. R. 359; *Hill vs. Wilkins*, 4 Mo. 86; *Martin vs. Hays*, 5 Mo. 62; *Davis vs. Davis*, 8 Mo. 56; *Samuel et al. vs. Martin*, 8 Mo. 633; *Helm vs. Bassett*, 9 Mo. 52.

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The bill of exceptions shows that he abandoned the case at the proper point, and announced an intention of coming to this court, with the case, we declined going into a new trial.

The case of *Emmerson vs. Harriet*, (decided since this brief was made) was decided upon the authority of *Helin vs. Bassett*, 9 Mo. 52, which does not necessarily overturn the established doctrine, as decided in all the other cases.

GEYER & DAYTON for defendant.

1. The judgment of non-suit (so called) now sought to be reversed, was the necessary legal consequence of the non-appearance of the plaintiffs to prosecute their suit, when called, it was neither compulsory on the plaintiffs, nor was it the necessary consequence of any erroneous decision of the court; it must therefore be regarded as a voluntary non-suit, not the subject of error. *Atkinson vs. Lane*, 7 Mo. Rep. 403.

2. No reason good in law nor true in fact, was assigned for the motion to set aside the judgment. It is true that the plaintiffs did at the previous term, except to the granting the new trial, *and signified* their intention to go from that point to the supreme court, and did file their bill of exceptions; but the case was nevertheless properly called for trial; there was no abandonment of the suit, though there was a promise to do so. No motion to stay proceedings; and therefore no reason why the cause should not be called for trial, or why the plaintiffs should stand mute when called. The only other reason assigned on the motion is not true in fact; it may be that the counsel of the plaintiffs *was* present, but that the court forced them to take a non-suit, is contradicted by the record.

3. The award of a new trial, if the subject of review in any case is not properly before the court in this. There was no motion or application in any form for judgment on the verdict, nor did the plaintiffs abandon the cause. He promised to do so, but continued to prosecute the action until the moment of trial, when (for ought that appears) other causes intervening, rendering it unsafe to proceed, the counsel of the plaintiffs refused to answer. *Davis vs. Davis*, 8 Mo. R. 56. The case of *Helin vs. Bassett*, 9 Mo. R. settles the point that the granting of a new trial, cannot be assigned for error. *Emerson vs. Harriet*, 11 Mo. R. 413.

There is nothing in the facts of the case to justify a reversal of the judgment on account of the award of a new trial. It is by no means clear that the plaintiffs were entitled to the possession of the slave Dick. Although it appears that Dick was the son of the slave given by Mrs. Williams to the plaintiff Elizabeth, it does not appear whether he was born before or after the gift. The testimony, therefore leaves the title in doubt. Besides, in the most favorable view of the case for the plaintiffs, there was no possession in the defendant at any time after the right of the plaintiffs accrued. According to the terms of the gift, the right of possession was in the defendant's intestate at the time of his death, and in the defendant afterwards until demand; and before the demand was made the possession passed out of the defendant, in obedience to an order of a competent tribunal. This disposes of the second count, which proceeds upon the ground, that the slave was unlawfully detained by defendant after the plaintiffs right of action accrued, and there is no pretence of a balement alleged in the first count.

The gist of the action is the wrongful detainer. *Miller vs. McDonald*, 2 Mo. R. 45; *Charles vs. Elliott*, 4 D. & B. 468. Although detinue may be maintained against a person who has held possession, but has parted with it before the date of the writ, yet it is incumbent on the plaintiff to show either actual possession at the date of the writ, or a general control over the property, or that he parted with the possession voluntarily. 4 D. & B. 468. Where the defendant has been lawfully dispossessed or was divested of the possession by due course of law. *Lowry vs. Houston*, 3 H. Miss. 394; *Lynch vs. Thomas*, 3d Leigh 682. The action will not lie against an administrator, who has come into possession of slaves, and sold them in due course of law. *Ford vs. Caldwell*, 3 Hill sec. 6. 242.

 ANTHONY WILKSON vs JOSEPH W. WALSH'S Executor.

NAPTON, J., delivered the opinion of the court.

As the course pursued by the plaintiffs counsel in this case was in accordance with a suggestion made in a previous decision of this court, we have thought it would best subserve the purposes of justice to reverse the judgment of non-suit and order a new trial. Without, therefore, intending to interfere with the discretion of the circuit court or court of common pleas in granting new trials (for the first time,) we shall make this order in this case. Judgment reversed and case remanded.

ANTHONY WILKSON vs. JOSEPH W. WALSH'S EXECUTOR.

ERROR TO ST. LOUIS CIRCUIT COURT.

SPALDING and SHEPLEY, for plaintiffs.

The representations of Walsh, at the time of the sale, that the slave *was sound and healthy*, and *nothing ailed him but a diarrhoea, got from change of water*, was relied on, and the sale made on the faith of it. It was, therefore, a warranty, or in nature of it, and if untrue, the action for damages would lie without necessity of alleging or proving a *scienter*, or fraud. 2 Iredell 477; 4 Iredell 238; 1 Smith's leading cases, see note to case of Candor vs. Lopres, at the commencement of English Ed. note, he says: "at the present day the rule of law is, that every affirmation at the time of sale of personal chattels, is a warranty, provided it appears to have been so intended." 4 Adolph and El. 473, representations on sale of chattel may be warranty, and jury are to judge, 5 Barn. et al 240; do.

The form of a declaration is the usual one on an express warranty, in some of the courts, and although it is alleged therein, that the defendant *falsely* and *fraudulently warranted*, yet averment of the fraud, or of the knowledge, need not be proved. 2 Chitty. Plead. 325, side page for form.

2 East. 446, that the *scienter* need not be proved in action on a *false warranty*. In this case the declaration is stronger than the present.

The second new trial could not have been granted for error of the jury in point of law. The declaration was on a warranty, there was evidence of a *warranty*. The jury found a warranty from that evidence. The warranty was, that Charles was *sound and healthy*, with exceptions of a *temporary diarrhoea* from change of water. It turned out that he was affected

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then by permanent disease, of which the jury believed, the diarrhoea only one symptom; no third new trial could therefore, be granted. Rev. Code of 1835, p. 470, sec. 2; 4 Mis. 86 Hill vs. Wilkins; 6 Mis. 185, Dickey vs. Malachi; 7 Mis. 57 Hill vs. Deaver; 7 Mis. 259 Hunbut vs. Eckert; 8 Mis. 56, Davis vs. Davis; 12 Mis. 194 in re Pratte and Cabanne; Graham on new trials, 541, 542, 543, 544, 545, 546, 547, merely states the course of decision, when no statute regulates the subject. Showing the two new trials, one not granted unless for error in law. 1 Humphrey's Rep. 16 Turner vs. Ross, the party claiming that new trials have been granted for the causes that would exempt the case from the limitation of the act, must show from the second, that such new trials have been granted for those causes. 10 Yerger 499 and Meigs Rep. 163.

Writ of error will lie on non suit. 7 Mis. Rep. 403.

GAMBLE, for defendant.

1st. The evidence shewed no warranty by Walsh.

2nd. The evidence shewed no representation by Walsh, that the slave was sound, without being coupled with the exception of the diarrhoea.

3rd. There was no evidence that Walsh knew or could know of any other disease in the slave. For: 1st. The slave was sound when he was brought to Walsh from Jefferson county. 2nd. He had owned him but a few weeks. 3rd. The exchange was made through other persons wholly disinterested.

4th. The plaintiff knew of the existence of the diarrhoea before the exchange, talked with Calvert about it, and he and Calvert agreed with Walsh, in regarding it as a temporary and unimportant affection.

5th. The condition of the slave is not afterwards spoken of, by any witness until some time in June, (the exchange having been made in the spring,) and then he is stated to be very feeble, but what disease he then had, is not stated.

6th. The slave did not die of the diarrhoea nor of any consequence of that disease, but of a pulmonary affection, and no connection whatever, is shewn between the fatal disease and the affection of the bowels he had at the time of the exchange.

These are matters arising out of the evidence which show that the verdict upon the evidence, ought not to have been for the plaintiff, and they are matters which the court might legally regard as affording sufficient ground, for granting a new trial, under the reasons assigned.

But supposing we are to consider the question alone, whether, on the second trial, the jurors erred in a matter of law. I make these points:

That the verdict could not legally be found for the plaintiff, unless there was evidence either of a warranty, or of a false and fraudulent representation of soundness. 2 Cains Rep. 48; 1 John. R. 96, 129, 274; 4 John. R. 421; 5 John. R. 395; 20 John. Rep. 196, the evidence shewed neither.

That the verdict could not legally be found for the plaintiff, on account of any unsoundness known to both parties at the time of the exchange, and not warranted against.

The evidence conclusively shewed that both parties knew of the only disease then existing, and it was not warranted against.

The plaintiff was not entitled to recover for the value of the slave on account of his death by any disease not existing at the time of the exchange. The evidence shewed a different disease, from that the negro had at the time of the exchange, and there was no evidence, whatever to connect them.

The triers of the fact have then erred in a matter of law, in that they have found for the plaintiff without evidence on those points where the law required him to give evidence of facts to establish his right to recover.

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In Graham on new trials 333, there is a collection of cases shewing many instances of verdicts set aside, because they were against law, and I take it that there is nothing in our statute which makes a distinction between "the triers of the fact erring in a matter of law," and a jury finding a verdict, which is against law.

This court in Hill vs. Deaver, 7 Mo. Rep. 58, has said "the error in law alluded to in our act, must be a misconception of the instructions of the court or of the general law, governing the case or an entire disregard of them, which must be inferred by a comparison of the verdict with the facts in testimony."

Tested by this rule, this verdict cannot be reconciled with the instructions of the court or the general law governing the case, but is in disregard of both.

NAPTON, J., delivered the opinion of the court.

We shall make the same disposition of this case which we have already made of the case of Martin and wife vs. Henley, and for the same reasons, reserving the question as to the proper construction of our statute concerning second new trials for further consideration. New trial ordered.

HUDSON B. POWELL vs. MICHAEL BUCKLEY.

Although a party who does work under a special contract cannot recover the price under the common counts, while the contract remains unexecuted; yet he may recover under those counts the price of extra work not embraced in the special contract.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of *indebitatus* assumpsit brought in the St. Louis court of common pleas by Powell vs. Buckley, to recover for carpenters and joiners work done on the defendant's house. The declaration contained the common counts for work and labor, &c., and the case was tried by a jury in the court below on the general issue.

On the trial it appeared in evidence that in the fall of 1845, Buckley made a contract with Powell to do the carpenters and joiners work on a house, (Buckley furnishing the materials) for the sum of \$136, of which one half was to be paid in Oct. 1846, and the other half six months afterwards. This contract rested on parcel, but the parties mutually executed a penal bond securing the performance of the contract under the penalty of five hundred dollars. Un-

HUDSON B. POWELL vs MICHAEL BUCKLEY.

der this contract, Powell proceeded in the fall of 1845 to do the work, he framed and laid three tiers of joints, set up partitions and some of the rafters, and while the building was incomplete, a sudden tempest threw down the walls and crushed and injured the framed timbers and other work that Powell had put in the building.

It appeared that Buckley was much disheartened by this accident and for a while thought of giving up his project of erecting a house, much negotiation was had between the parties; Buckley proposed to give Powell a lot, but they did not agree on the price. After a delay of several weeks, Buckley concluded to resume the work of building a house, and in fact Powell did the carpenter and joiners work, but on what terms this last work was done was the principal question of difference between the parties on the trial. On the part of Powell it was insisted, and proof was adduced tending to show that the old contract was set aside and that he was to be paid for his labor a fair price in money. On the other hand Buckley contended that the original contract was by agreement extended to this new work: proof of Powell's declarations during the progress of the work was adduced to show this understanding of the parties. It was however, admitted on all hands that Powell had done on the second house, more work than was embraced in the contract, and Buckley expressed a willingness to pay for such work as extras. The work was all completed early in May, 1846, when Powell sent persons to make a measurement, but Buckley, who was living in the house would not permit it, saying that nothing required measurement but the extra work and that should not be measured until Powell furnished a bill of that work, the amount and value of the work was proved by the witnesses.

The court gave these instructions:

1st. If the jury find from the evidence that the work sued for in this action was done under a special contract between the parties, the verdict ought to be for the defendant.

2nd. Although the parties may have agreed to abrogate the contract when the house fell down, yet if the jury find that afterwards and during the progress of the second building the plaintiff recognized the existence of a contract, it is evidence from which the jury may infer that the contract is reinstated and is still in force. The jury found for defendant. Instructions covering the plaintiff's view of the case were offered and refused. The questions were properly saved by exceptions and motion for a new trial and the case now here by appeal.

CARROLL for appellant.

It is well settled that if there be a special agreement made afterwards, the parties make a new and distinct agreement by parol, whether it be as a substitute for the old, or in addition to, and beyond it, the injured party can sue in assumpsit, and if subsequent, it is immaterial whether it refers to, and partially or *totally* adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned. Nor is it of any consequence that the old agreement is under seal. See Bunn vs. Miller 4 Taunt. 745; Foster vs. Allason 2 T. R. 479; 1st Washington's Rep. p. 170; 1 East's Rep. 629; 13 Mass. Rep. 446; 14 Johns. Rep. 330; 7 Cowen 48, 2 Watts Rep. 456; 1 Appleton 405, 9 Pick. Rep. p. 298. See also Greenleaf on evidence page 371, sec. 303.

If the work be done under a special agreement, the contract must be complied with before compensation can be claimed. This is the general doctrine, subject *always* to these exceptions, viz: where the other party prevents a compliance; where the contract is waived by agreement; or lastly, where a performance of its stipulations is prevented by an act of God. In this case, the second in this list of exceptions exists, as will be seen by the testimony cited; and the last also exists, since by its terms, the house was to be completed in a space of time, which if Powell had begun the very day after the hurricane to reconstruct, was entirely too short to make it possible for him to finish the work in season. See the special agreement page 19 of record.

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See the language of this court in 4 Mo. Rep. Helm vs. Wilson p. 44.

Although there be a special agreement, yet if subsequently a modification of it is made by the parties to it, such modified agreement may be engrafted on the old bargain, so as to make a new and good agreement, and when executed, may be recovered on as such.

For contracts are to be construed according to the intentions of the parties as expressed by their words and actions, and not by their secret mental reservations, made only to entrap and deceive the unwary. As to Buckley's acceptance of the work, and his liability on that account, notwithstanding a special contract may be supposed to have existed (which is utterly denied.) See 7 Mo. Rep. p. 530, Thompson and Sowers vs. Allsman.

The first instruction thus given reads thus:

If the jury find from the evidence that the work sued for in this action, was done under a special contract between the parties, the verdict ought to be for the defendant."

The error here consists in the opinion, that work done under a special contract cannot be recovered under the common counts, and the account stated among them, *even after it is executed.* The case before cited and decided by this court, of Thompson and Sowers vs. Allsman, 7 Mo. Rep. p. 530, is conclusive on this point, a part of this work was doubtless due under the old contract, viz: that part which was done before the hurricane, and yet if the old contract was then "abrogated" and a new one made under which the remaining work was done, the whole can be recovered in this action. See 2 Watts Rep. p. 456, above cited, and also 1 Appleton p. 405. In the former the court says expressly that "it is certainly less incongruous to reduce the whole to parol; the written contract being treated as abandoned or used no further than to mark the terms and extent of the new stipulation." Vicary vs. Moore. So that the instruction did not cover the whole case.

Under that instruction, if the old contract was abandoned, and a new special contract was made the jury were forbid from finding under such new contract.

The 2nd instruction given by the court is far worse than the first. It is in these words, viz:

Although the parties may have agreed to abrogate the contract when the house blew down, yet if they find that afterwards, and during the progress of the second building, the plaintiffs recognized the existence of a contract, it is evidence from which the jury may infer that the contract has been reinstated and is still in force.

This is neither law nor logic. If the old contract was once "abrogated," I apprehend there was an end of it. There is no regeneration to such a contract. It cannot be "reinstated" except with the same formalities with which it was originally made. The idea of a contract under seal being once "abrogated" and then reinstated by parol, is a judicial novelty to say the least of it.

If there was any reinstatement of the contract, it became a new, distinct, and independent agreement by parol, upon which the action of assumpsit will properly lie after the execution of the contract. If the old contract was once "abrogated" it was "abrogated" for ever. A bond may be discharged by parol agreement. Sec. 7, Cowen 48, Dearborn vs. Cross & Thracker. But once discharged, could a bond be "reinstated" in any way, except by a new bond? The new contract may be between the same parties, and it may contain the same stipulations precisely, and it may be acted upon by them; but is the bond thereby reinstated? Surely argument is unnecessary and authority useless to illustrate a proposition only respectable because pronounced by a respectable tribunal.

I have shown that in the case of a special contract, where a subsequent agreement is made, which refers to and partially or totally adopts the provisions of the former contract, the party can sue in assumpsit, provided the old agreement is rescinded or abandoned; and I presume by using the word "abrogated" the court meant the same thing that is signified by the words *rescinded* or *abandoned*.

Again, I refer the court to Greenleaf on Ev. p. 371, sec. 303. This instruction is also erroneous in this, that the jury are told if there was *any* contract between the parties, that con-

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tract must have been the old contract under seal; for the "court says if the plaintiff recognised the existence of a contract, it is evidence from which they may infer that the contract had been reinstated, and is still in force."

HART for appellee.

1st. That the plaintiff's testimony proves only a negotiation for an abandonment of the original contract, but it failed or was given up. That the defendant's evidence proves that the subsequent work was done under the original contract, most clearly, but probably altered in the time. Therefore the plaintiff can only claim under the original contract altered as to time. The accident did not release Powell, for the act of God does not, in such cases, release or excuse.

2nd. If the above be correct, then it follows that Powell had sued immediately before the money was due. The record does not show whether this point was made below.

3rd. By the evidence it appears that no value of extra work was proved beyond what Buckley had paid.

Judge BIRCH delivered the opinion of the court.

We suppose the first instruction in this case to have been predicated, not upon the ground that the plaintiff had misconceived, but immaturely commenced his action. Even in that view, however, we deem it to have been too broad and unspecific: whilst it was proper to inform the jury, in the hypothetical manner assumed in the instruction, that for work found to have been done under the agreement, a right of action had not accrued at the time of bringing the suit; the instruction should have gone farther, and have discriminated between such work and the extra services to which the testimony had relation. For such services, if any thing remained due, the plaintiff was entitled to judgment, and the court should have so informed the jury. We have reference, of course, to the extra work performed upon the second building, for as to the first, which was blown down, unless the jury should be satisfied that there was, and remained, a subsequent specific agreement to pay for it, we perceive nothing in the facts of this case to distinguish it from precedent ones, in which the pleadings of conscience and the weight of authority alike concur to discharge the defendant.

Let the judgment, therefore, be reversed, and the cause remanded for further proceedings in conformity with this opinion.

 ROBERT KEETON et al. vs. WILLIAM SPRADLING et al.

ROBERT KEETON ET AL. vs. WILLIAM SPRADLING ET AL.

1. Where a court of chancery obtains jurisdiction of a cause for any purpose, it may proceed with the whole case and decide it upon its merits.
2. If a person whose name is not inserted in the body of an instrument of writing, signs and seals it at the foot thereof, it is a sufficient execution to make it his bond in a court of equity.

APPEAL FROM ST. FRANCOIS CIRCUIT COURT.**FRISSELL for appellant.**

The failure to insert the names of the securities in the body of the bond, does not vitiate the bond. *Ex parte Fulton*, 7 Cowen Rep. 485; *Smith vs. Crooker et al.* 5 Mass. 538; *Dobson vs. Keys*; *Croke James*, 261; *Penn vs. B.*, 6th Mart. Lo. Rep. 497; *Blakey vs. Blakey*, 2 Dana 460; *Bartley & Ferguson vs. Yales*, 2 H. and M. Rep. 398; *Adams vs. Wilson*, 10 Mo. Rep. 341; *Tevis vs. Hughes*, 10 Mo. Rep. 380; 1 Tuck. Com. 275; *Crawford vs. Janett's adm'r.* 2 Leigh. 630.

It is insisted that the complainants had no remedy at law, for the reason of the false and fraudulent final settlement of Wm. Keeton in the Jefferson county court. This settlement must be set aside before a remedy at law would be available.

See *Keeton's distributees vs. Cambell et al.*, Humphrey's reports, 224 Tennessee.

COLE for appellees.

1st. That as to the demurrant there is no equity in the bill of complaint. The bill is to enforce a penalty in a bond against appellee. This belongs to a court of law, *Comm. on Equity pleading by Story*, page 398, sec. 521; *Mo. law*, 836, sec. 1.

2. That if the complainants are entitled to any remedy, it is at law. 1 Chitty pleadings, 39-2; Chitty 209, 16, 520. They have an adequate remedy there.

3. That the instrument, called by complainants a bond, is in fact not the bond of John Smith T., nor was the same in any wise obligatory upon him during his lifetime, nor upon his heirs since. *Adams et al. vs. Wilson*. 10 Mo. Rep. 342; *Tevis et al. vs. Hughes*, 10 Mo. Rep. 381.

4. That the bill of complaint contains distinct matters and separate demands that cannot be joined together. The bill is multifarious. *Story's pleadings in equity*, page 153. Note 1 and 2, *Maddock* 193; *Jones vs. Paul*, 9 Mo. Rep. 296; *Blackwell vs. Wilkson*, 4 Mo. Rep. 428.

NAPTON, J., delivered the opinion of the court.

This is a bill in chancery, filed in the circuit court of St. Francois county, by the heirs of John Keeton against William Spradling administrator of William Keeton, who was in his life time the administrator of John Keeton, and against the heirs of John Smith T., and Elisha Ellis who were securities in the administration bond of said William Keeton.

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The facts upon which relief is sought are stated in the bill as follows: John Keeton came to Jefferson county, in Missouri, some time in 1825, leaving his family and the bulk of his estate in Tennessee, but bringing with him about twenty slaves. He died early in the fall of 1826, and on the 8th September of that year, letters of administration upon his estate were granted by the probate court of Jefferson county to Michael Taney. On the 15th March 1827 these letters were revoked and letters of administration were granted to William Keeton, who came to this State for this purpose and who had previously taken out letters of administration upon John Keeton's estate in Tennessee. John Smith T. and Elisha Ellis became securities upon William Keeton's bond. William Keeton hired out the slaves, but kept the proceeds and shortly removed the slaves to Tennessee. He then made a pretended or fraudulent sale of them, without any order of a court of competent jurisdiction, and became himself the purchaser of a portion of them and others were bought in by the heirs. He returned to this State with such of the slaves as he had thus fraudulently thus purchased, died here, and the slaves are now in the possession of his administrator William Spradling.

William Keeton had made a final settlement with the probate court of Jefferson county on the 11th September 1830, which is alleged to be fraudulent.

It is further stated in the bill, that William Keeton as administrator of John Keeton in Tennessee, received large sums of money, unaccounted for, amounting to about \$1500 to each heir. That suit was instituted in Tennessee upon the bond given there, against the securities in that bond, that a decree was rendered and an account ordered, but that this decree was reversed by the supreme court of that State, or at least, so much of it as held the securities upon the Tennessee bond liable for the slaves received in Missouri. It is also stated that P. Pipkin, administrator de bonis non of John Keeton has brought suit against Spradling for these slaves.

The prayer of the bill is that Spradling, who is the administrator of William Keeton deceased, may be held accountable for the hire of the slaves under his control as such administrator, and originally belonging to the estate of John Keeton and as far as he has received assets, may be also responsible for the annual value of these slaves from the time they came into the hands of W. Keeton as administrator of John Keeton, that in the event of a deficiency of assets, the heirs of John Smith T. and Elisha Ellis be held accountable for this deficiency, their ances-

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tors having been securities upon W. Keeton's bond as administrator.

The bill charges that all of John Keeton's debts have been paid.

To this bill a demurrer was filed, and sustained by the circuit court.

This bill though containing a great deal of irrelevant matter, seems designed as an auxiliary proceeding to a suit at law instituted by Pipkin, the administrator de bonis non of John Keeton, for the possession of certain slaves alleged to have been fraudulently procured by William Keeton. The prayer of the bill is confined entirely to an account of the annual value or hire of these slaves, from the time they fell into the possession of W. Keeton as administrator of John Keeton, up to the institution of the suit at law by Pipkin. As William Keeton had made a final settlement of his administration in the probate court of Jefferson about eighteen years before the institution of these proceedings, it was necessary to set aside this settlement, as an insuperable bar to the claims here advanced on the part of his heirs. This settlement is therefore attacked as fraudulent. The statements of the bill in relation to William Keeton's mal-administration in Tennessee and his failure to pay over to the heirs the several sums to which they were entitled upon a fair settlement of the Tennessee estate, appears to be entirely foreign to the general object sought. If it were not so, and this portion of the bill is to be regarded as laying a substantial foundation for any claim against Spradling, it is manifest that such a controversy is one, in which the heirs of John Smith T. and Elisha Ellis have no concern. The objection of multifariousness in this view of the bill would be a sound one. But I take these recitals in relation to the Tennessee suit as merely superfluous, and as they are followed by no prayer for relief upon this head, they would seem designed to be merely illustrative of the general history of the case.

The reference which is made in the bill to the suit at law against Spradling, which was instituted to get possession of such of the slaves as still remain a part of William Keeton's estate, would rather show that two suits have been instituted where one only could be necessary. For if the fraudulent settlement of 1830 is to be the basis of jurisdiction to the court of chancery and enable it, in accordance with its established usages, to proceed with the whole case and decide the merits, such a principle of action would as well authorise a decree for the restoration of the slaves themselves, as for their hire or annual profits. However this may be, it will constitute no serious objection to the present bill.

It is manifest that the responsibility of the heirs of John Smith T., and Elisha Ellis, depends upon a question which is somewhat adverted to in

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the case of *Pipkin vs. Casey*, decided at the present term. If the slaves of John Keeton's estate were delivered over to William Keeton as the administrator in Tennessee and were there inventoried as a part of the estate, and in the counsel of this Tennessee administration, these slaves were fraudulently or illegally disposed of. The securities upon W. Keeton's bond in Missouri are unquestionably not liable. This question however does not arise upon this demurrer. The settlement here is alleged to be fraudulent, the removal of the slaves to Tennessee declared to be without authority, and the disposal of them then without the sanction of any court having jurisdiction. We have adverted to this point only because we cannot avoid seeing, with the record of the suit of *Pipkin vs. Casey* before us, that the result of the present suit in equity must depend, so far as a portion of the defendants are concerned upon the facts and principles to be settled in several other collateral suits growing out of this same transaction.

It has been suggested as a ground for sustaining this demurrer, that the names of John Smith T., and Elisha Ellis, do not appear in the body of the instrument, although signed and sealed at the foot. The objection is based upon a former decision of this court. Upon a careful examination of all the cases, we think the objection is not a good one, at least in a chancery proceeding. The authorities for holding such a bond void against the signer whose name is not inserted in the body of the instrument, in a suit at law, are not satisfactory and the cases in our court concede the right to set up a bond thus executed in equity. *Ex-part Fulton* 7 Cow 485. *Dobson vs. Keys* Cro. Jac. 261. *Smith vs. Crooked*, 5 Mass. R. 538. *Blakey vs. Blakey* 2 Dana 463, 2 Litt. R. 287. *Bartley and Ferguson vs. Yates* 2 H. and Memp. 398. *Crawford and others vs. Janell's adm'r* 2 Leigh 630.

The other judges concurring, the decree is reversed and the cause remanded.

JOHN R. HAMMOND & GEORGE B. JUDD vs. THERON BARNUM.

JOHN R. HAMMOND & GEORGE B. JUDD, vs. THERON BARNUM.

The St. Louis court of common pleas has not jurisdiction of actions, instituted under the act of 1843, to enforce "liens of mechanics in the city and county of St. Louis."

ERROR TO ST. LOUIS CIRCUIT COURT.**STATEMENT OF THE CASE.**

Hammond & Judd, brought an action of ejectment against Barnum, for a lot in St. Louis. The suit was tried by a jury on the general issue. On the trial the plaintiff read in evidence a record of a lien filed in the clerk's office of St. Louis county, in favor of the plaintiffs, against one Nathan L. Milburn, and covering the property in question. The lien was filed 10th July 1847 and arose out of an account for building materials. The plaintiffs then read a transcript of suit, judgment and execution in St. Louis court of common pleas, in favor of the plaintiff, against Nathan L. Milburn. This suit was a common action of assumpsit, and the account on which it was brought and for which judgment was rendered, was proved by a witness to be the same which was filed as a lien as stated above. The writ of execution was a special *fi-fa* against the property described in the lien (and being the lot in question) reciting the lien and ordering a sale. The plaintiffs then proved a sale by the sheriff under the execution and a deed to the plaintiffs of the property in question. These were in common form. Plaintiffs also proved that the account filed as a lien was just, and that the lumber therein charged was furnished and used for building on the premises in question. The suit in St. Louis court of common pleas was commenced 12th August 1847, judgment rendered 30th Nov., execution issued 31st December 1847, sale advertised 21st January 1848, sale 11th February, and deed by the sheriff dated 12th February 1848. Plaintiffs then proved that Nathan L. Milburn was in possession of the property in question from Christmas 1846, till November 1847, and built a carpenter's shop upon it, that while in possession he claimed to be owner, that he read to witness a paper by which it appeared that he Milburn was to pay \$600 in one year, and \$1,500 in six years. That the \$600 was paid, and that Milburn had the sole possession during the time above stated. Plaintiffs then proved that the records of St. Louis county recorder's office had been searched, and no lease or other title paper to Milburn was found on record. The possession of the defendant at the date of the ejectment suit, was admitted before the jury.

Such was the plaintiff's case.

The defendant then read an admission to the effect that the property in question was owned by J. H. Lucas on 9th August 1844. He then read a deed of the lot from Lucas and wife to Josephus W. Hall, dated 10th August 1844, and another deed from Josephus W. Hall and wife to defendant dated 10th August 1847. The last deed was acknowledged 29th September, 1847 and recorded the same day. Defendant also proved that after Lucas died, Hall went into possession of the lot, and that he told witness that Milburn was his tenant or in possession under him, witness could not say exactly how. This was all the defendant's evidence.

The plaintiffs asked the following instructions:

"If the jury find that the carpenter's shop, for which this suit is brought, was built by Nathan L. Milburn with the knowledge of the proprietor of the ground, or that such proprietor permitted said Milburn to take possession of the ground and erect such shop with his consent, then said shop and the ground belonging to it are liable to a lien for materials furnished for the building in the same manner as if Milburn were himself the proprietor of the ground."

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"If the jury find that Milburn was a tenant of Hall, of the ground on which the shop was built, and that no lien from said Hall or to said Milburn was on record in the recorder's office of St. Louis county, the ground on which said shop was built was liable to liens incurred in building said shop."

These instructions were refused by the court, and the plaintiff took exceptions.

The court then on defendant's motion, gave this instruction:

"The deed from sheriff Conway to the plaintiffs, given in evidence by them, passed no title to the plaintiffs to the premises described in the declaration in this case."

To the giving of this instruction the plaintiffs excepted. The plaintiffs then submitted to become non-suited.

The usual motion to set aside the non-suit was made and overruled and exceptions saved.

The case is brought to the supreme court by writ of error.

FIELD for plaintiffs in error.

1st. With reference to the lien law of 1843,

The court below decided that the court of common pleas had no jurisdiction of a suit brought to enforce a lien under that law, and consequently that the judgment, execution and sale under which the plaintiffs claimed were merely void.

But the Revised laws 1845, expressly give the common pleas concurrent jurisdiction with the circuit court in *all civil actions*. Rev. laws, 1845, p. 315.

This provision is contained in an act specially applicable to St. Louis county, and satisfies the requirement contained in sec. 22 cap. 101, Rev. laws 1845, p. 699.

There is nothing in the nature of the proceedings under the act of 1843, inconsistent with the jurisdiction of the common pleas. The proceedings throughout are those of an ordinary action, and the objects of filing the lien in the clerk's office of the criminal court is under the act of 1843, to give notice to parties interested.

2nd. Without reference to the lien law,

There was a regular judgment in assumpsit in the court of common pleas, an execution, sale &c. That reference to a lien filed in the award of execution is mere surplusage.

At most this reference could only make the execution erroneous, certainly not void, and errors or irregularities in the proceedings cannot affect the title of a purchaser. *Jackson vs. Roswelt*, 13 J. R. 97; *Jackson vs. Baillott*, 8 J. R. 361; *Woodcock vs. Burnett*, 1 Cow. 641; *Milburn vs. Ray*, 11 Mo Rep.; *Perp'l. Ins. Co. vs. Ford*, 11 Mo. Rep.

POLK for defendant.

1st. The court of common pleas had no jurisdiction in the matter of lien in the case of *Hammond & Judd vs. Nathan L. Milburn* (the record of which was given in evidence by plaintiffs,) and no right to enforce a lien under the mechanics lien law, in said case, by ordering a special *fi-fa* against the property described in the record of the lien given in evidence by the plaintiff. Session acts of 1842, 3 p. 83; Code of 1845, p. 699, sec. 22.

By the above mentioned acts of the legislature the circuit court only, has jurisdiction of demands under the mechanic's lien law. Jurisdiction is not given by the act establishing the court of common pleas to that court. Code of 1845, p. 315 sec. 2.

By code of 1845 p. 699, sec. 22, "All acts and parts of acts specially applicable to the city or county of St. Louis, and in force at the commencement of that session of the legislature, and not repealed or modified by some act of that session specially applicable to said county or city were continued in force. Now the act of 1843 (see acts of 1842-3, p. 83,) is in the highest sense specially applicable to the county of St. Louis. But the act of the General Assembly establishing the court of common pleas, is not specially applicable to the city

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or county of St. Louis, in the sense of the last named act. It establishes a court in the county of St. Louis, it is true, but it is no more specially applicable to the county of St. Louis than is the act making the county of St. Louis the 8th judicial circuit.

Again the jurisdiction of the court of common pleas is well nigh co-extensive with that of the circuit court. See Code of 1845, p. 315, sec. 2. It has concurrent original jurisdiction in all civil actions at law with the circuit court. By sect. 8, p. 316, of code of 1845—practice, process and proceedings, same as in circuit court. By sects. 3 and 4, change of venue provided for from circuit court to common pleas, and from common pleas to circuit court. By sect. 20, judge of common pleas has same powers as judge of circuit court. Its jurisdiction, therefore, is not confined to the county of St. Louis any more than is the jurisdiction of the circuit court; but is co-extensive in the circumference of its extent with that of the circuit court.

This act, therefore, does not vest jurisdiction of cases under the mechanics lien law in the court of common pleas.

2nd. The lien of Hammond & Judd did not attach under the mechanics lien law until the 12th August, 1847, the date of the commencement of this suit against Milburn as against said Milburn. See code of 1845, p. 735, sec. 7; *Milan et al. vs. Brafee*, 6 Mo. 637.

This is true notwithstanding the 6th sect. of the act, 1843, (acts of 1842-3, p. 84.) For this act merely fixes the priority of the mechanics lien in respect to other incumbrances, but does not claim to fix the date at which the lien attaches, as between the mechanic and his debtor. This is left to the code of 1845 as above cited.

But before the 12th August, 1847, when Hammond & Judd commenced their suit against Milburn, the land on which the shop was erected, had been conveyed to defendant Barnum; that is to say, on the 10th of August, 1847. See record, p. 15.

3rd. The sheriff could have sold and conveyed, under the execution in favor of Hammond & Judd vs. Milburn, only such interest in the premises on which the lien was filed as Milburn had therein. In other words, he cannot have sold or conveyed a greater interest in the premises than said Milburn ever had in them.

It being always borne in mind, in this case, that the record does not show that there was any assent ever given by Hall, the owner of the fee in the land to the erection of the shop. See code of 1845, p. 733; Session acts of 1842-3, p. 83; *Milan et al. vs. Brafee adm'r.* 638; *Carson's lessees vs. Benoist*, 2 Wash. C. C. R. 33.

In the case in Pennsylvania (9 Watts 52) it appeared that the owner of the fee assented to the erection of the building by the man in possession of the lot; but such is not the fact in this case. And for the truth of this, I refer to the bill of exceptions in this case.

But that such assent is necessary even in Pa., in order that the lien and the proceedings to enforce the same should affect the interests or estate of others than the person contracting the debt, is apparent from the case of *Anshutz vs. McClelland*, 5 Watts, 490.

And the same principle is established in the case of *Spillman vs. Shunk et al.*, recently decided by this court and not yet reported. For in this last named case, the owner of the fee knew and consented to the doing the work, and was often present while the work was going on.

The act of 1842-3 (see acts 1842-3, page 83, sec. 1) gives liens to persons whether employed by the owner, contractor, or sub-contractor. And the 2nd sect. of the act provides for cases where a lessee of premises procures work to be done upon them, and enacts that in this class of cases, nothing but the leasehold interest shall be bound by the lien, except where the landlord omits to file his lease for record, in which case, as a penalty for his neglect, the lien is allowed to attach to more than the leasehold interest of the lessee.

But when the owner of any other estate in the land upon which the work is done, procures the doing of work or furnishing materials, the lien attaches only upon such estate or interest in the land as such employer may have therein; upon the fee, if he owns the fee, but only upon a life estate, if he owns no more than a life estate. But the statute provides that when the

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party doing the work is employed by the *agent* of the *owner*, that then the lien may attach. That is, if the owner of the fee, for instances, should constitute the owner of a less estate or a contractor, his agent for the purpose of having the work done, in such case the lien shall fasten itself upon the fee. As in case the fee simple owner should know and consent to the doing of work by persons employed by a contractor, or by the owner of a life estate in the land.

Any other principle would enable one man, and he a stranger, to encumber the estate of another without his knowledge or consent.

Now that the record shows that Milburn had no title whatever, he had merely a naked possession, which was extinguished immediately upon the execution of the deed by Hall to Barnum. As against Barnum, who purchased the full title from Hall, he had no title at all, and consequently he had no interest in the land to be conveyed by the sheriff's deed.

4th. No person who has not made a contract with the owner of the land or his agent, can avail himself of the benefit of the lien law, unless he has given notice within 30 days after the indebtedness occurred, or the completion of the building, that there is a certain amount due thereon, and that he intends to hold the building until it is paid. A copy of which notice must be filed with the lien. See acts of 1842-3, p. 83, sec. 3.

In this case no such notice was given. See bill of exceptions. And Milburn was not the owner of the land in the sense of the statute.

5th. If the court was right, as it is contended it was, in giving defendant's instructions, it also follows that it was right in refusing the instructions prayed by plaintiffs counsel.

But these instructions were properly refused, because there was no evidence before the jury on which to predicate them. For this I refer to the bill of exceptions. Where does it appear in the bill of exceptions in this case that Hall, who was the owner of the land at the time Milburn built the shop on it, ever consented or ever knew that the shop was being erected?

So, likewise, there was about as little to justify the second instruction prayed by plaintiffs counsel. The 2nd of plaintiffs instructions ought not to have been given for another reason. It proceeds upon the supposition that there was a lease from Hall to Milburn of the land on which the shop was erected. But by the 3rd sect. of the act of '43, (see acts of 1842-3, sec. 3) in such case the person doing work or furnishing materials, cannot avail himself of the benefit of the lien law, unless he shall give notice to the owner within 30 days after the indebtedness accrued, or the completion of the building, that a certain amount is due him, and that he means to hold the building therefor.

6th. It is claimed in this case that although the plaintiffs in this case may not be able to claim any thing under their lien, yet that the judgment and execution they gave in evidence must operate as an ordinary general judgment and execution, and as such, passed Milburn's interest in the premises. To this, I answer, that Milburn had nothing more than a mere naked possession of the premises. And this possession terminated on the —th of Nov. 1847. But the execution, under which it is claimed his possession was sold, was not issued until the 31st day of December 1847, and the sale did not take place until the 11th of February 1848. Thus at the time of the issuing the execution and of the sale upon it, Milburn had no interest whatever in the premises, and of course, nothing could have been conveyed by the deed from the sheriff.

But even suppose that Milburn had more than a mere naked possession of the premises—that he was there upon an agreement of purchase from the proprietor—that he had an *equitable* interest in the premises; and that such interest passed to plaintiffs by the sheriff's deed to them. Still the deed from the sheriff passed no title to plaintiff upon which they could maintain this action. For an act of ejectment cannot be maintained in this state upon an equitable title of this kind. See code of 1845, title ejectment. Therefore, through the instruction of the court (on this hypothesis)—“that no title passed by the sheriff's deed”—is broader than it need have been, yet the plaintiff suffered no injury by its being thus broad. For if the instruction had been that the deed passed no title upon which an action of ejectment (this ac-

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tion) could be maintained, it would still have defeated the plaintiffs. And taking the instructions in reference to the case before the court, the instruction given was but tantamount to this. It included this one.

The sheriff levied on and sold the carpenters *shop* and not the *premises*.—the *lot*. But the ejectment is not for the *shop* merely, but also for the *lot* on which the shop stands.

7th. In the case of McDermot vs. Doyle decided by this court recently and not published, this court held that a suit on a bond given in an action of *detinue*, in the circuit court, to the sheriff, must be brought in the circuit court and cannot be brought in the common pleas court,—because the action on the bond was a continuance and part of the first action. So here the party filed his lien in the circuit court—the commencement of the proceedings is in the circuit—and the enforcement by action is in the common pleas.

RYLAND, Judge, delivered the opinion of the court:

The principal question in this case, depends on the jurisdiction of the court of common pleas, in actions to enforce a mechanic's lien in the city and county of St. Louis.

The only doubt I entertained on this question was as to the continuing in force of the act of the legislature, respecting mechanics liens in the city and county of St. Louis, passed at the session of the general assembly in 1842 and 3. See the act for the better securing of mechanics and others erecting buildings or furnishing materials for the same, in the city and county of St. Louis. Pamphlet acts. Session 1842 page 83; and this doubt has yielded to a decision of this court. In the case of Gaty, McCune and Glasby vs. Brown and others, 11 Mo. Rep. page 141, this court unanimously decided, that the above mentioned act is preserved and continued in force by the 22nd section of the act concerning revised statutes. Rev. Code 1845 page 699.

I feel unwilling to disturb that decision. By the above mentioned act of 1842 and 3, the *suit in all cases when the amount is over \$90; shall be brought in the circuit court.*

This court decided, that a *scire facias* to enforce a mechanic's lien could not be maintained in the court of common pleas, see the above cited case of Gaty, McCune and Glasby vs. Brown and others, and although that decision does not reach this question, for the Judge in delivering the opinion says, this question is not raised in that case. Yet it is impossible to withdraw this question from the principle embraced within that decision, what is a proceeding by *scire facias* to enforce a mechanic's lien, but a civil suit? It cannot be pretended, that the lien filed is a record of the circuit court, and therefore a *scire facias* may well issue on it as such record in that court and in no other. By the act of 1842 and 3 the party having the lien may enforce it by *scire fa-*

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cias or by any other civil action : as the act is silent as to the form of suit or proceeding leaving it to the party's option. Then the same reasoning which deprives the court of common pleas of the jurisdiction of the remedy by *scire facias*, will deprive it of the remedy by *assumpsit* or other common law action. And the party must enforce his lien by suit in the circuit court.

The lien being required by law to be filed in the office of the clerk of the circuit court ; the legislature may have deemed it most prudent and wise to require the action to be brought in that court, and in none other.

Under this view of the law, then, the instruction given by the court below for the defendant is correct and those asked for by the plaintiffs properly refused. The judgment of the court is therefore affirmed.

THOS. B. ODELL & SAM'L. E. FRINK vs. GEO. G. PRESBURY JR., STEPHEN T. CASKILL & JAS. M. FRANCISCUS.

A blank endorsement of a promissory note by the payee, though done solely for the purpose of collection, is *prima facie* evidence of an assignment for value, and may be so treated by any subsequent assignee.

APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

Odell and Frink, merchants of New York, having sold goods to Isaac Griffin, a merchant of Belleville, Illinois, took his note (not negotiable) for \$382 53-100ths. payable to their order, at the Bank of the State of Missouri at St. Louis, seven months after date, and dated 20th August, 1847. It fell due 20th March, 1848.

On the 26th of February, 1848, Odell and Frink endorsed and delivered the note of Griffin to Joseph S. Lake & Co., brokers and private bankers in the city of New York, for the sole purpose of collection, and the plaintiffs, Odell and Frink, were in no case indebted to Lake & Co. Lake & Co. endorsed the note, and on the 26th of February, 1848, enclosed it to Geo. E. H. Gray & Co., of which firm the defendants are the company, "for collection."

Geo. E. H. Gray & Co., of St. Louis, were brokers and private bankers, and there was an agreement between Lake & Co., and Gray & Co., that either party could draw on the other,

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with or without funds in their hands, and the course of dealing was according to that agreement. *Drafts* remitted, were passed to the credit of the party remitting. Lake & Co., remitted no funds to Gray & Co., to draw against. Gray & Co., remitted to Lake & Co., from 25 to 30,000 dollars per month, to draw against at New York. The amount of business done by Lake & Co., for Gray & Co., largely exceeded that done by Gray & Co., for Lake & Co., and it was *only occasionally* that Lake & Co., had any thing to do at St. Louis. The business of Lake & Co., with Gray & Co. at St. Louis, was the collection of drafts and notes which were generally received from merchants in New York for that purpose, and then remitted to St. Louis. *This note*—the Griffin note—was remitted in the ordinary way in which other notes were remitted to Gray & Co., by Lake & Co.

On the 25th of March, 1848, three days before the failure of Lake & Co., Gray & Co., addressed Lake & Co., thus: "We have to your credit, Isaac Griffin's note paid \$382 53-100ths Geo. E. H. Gray & Co." On the news of Lake & Co.'s failure, Gray & Co., sent a member of their firm to New York, and he was notified prior to any settlement between Gray & Co., and Lake & Co., that the Griffin note belonged to Odell and Frink, the plaintiffs. On the 20th of April, 1848, Odell & Frink demanded the proceeds of said note, collected by Gray & Co., of them, at their banking house, and they refused to pay over, claiming to hold the proceeds of the plaintiffs note by virtue of a lien for the general balance of their accounts against Lake & Co.

The plaintiffs sued Gray & Co., on the common counts, and a special count. Defendants plead the statutory general issue.

On the trial, the foregoing facts appeared in evidence, and the defendants admitted they were partners in the firm of Geo. E. H. Gray & Co., and that the note referred to, was the same identical note paid by Isaac Griffin to Gray & Co. The defendants then asked the following instructions.

"If the jury find from the evidence that the note of Isaac Griffin was endorsed by the payees to Lake & Co., and by them to the defendants, and that the defendants received the money, and applied the same to the credit of Lake & Co., on any account before their failure, in the usual course of business, and that Lake & Co., were indebted to the defendants at the time of such application, and the same had not been otherwise discharged, and that the defendants had no notice of the interest of the plaintiffs other than what the paper and its endorsements imparted prior to such application of the proceeds of said note and failure of Lake & Co., they will find for the defendants."

2nd. The endorsements of Odell and Frink transferred the legal title in the note to J. S. Lake & Co., and if the plaintiffs seek to recover of the defendants on the ground, that defendants had notice when they received the money and credited it to Lake & Co., on the note, that it was the property of the plaintiffs, and not the property of Lake & Co., it is for the plaintiffs to prove such notice before they can recover in this suit."

To the giving of the above instructions, the plaintiffs at the time excepted and objected, but the court gave said instructions to the jury, to the giving of which the plaintiffs excepted and objected.

The plaintiffs then moved the court to give the following instructions to the jury:

1st. "If the jury believe from the evidence that Geo. E. H. Gray & Co., at the time of the receipt of the Griffin note had notice either express or implied that Joseph S. Lake & Co., had no interest in said note, and that it had been transmitted to them for collection, merely as agents then Gray & Co., were not entitled to retain, against the plaintiffs the proceeds of said note for the general balance of their account against Lake & Co.

2nd. "And if Gray & Co., had not notice that Lake & Co., were merely agents, but regarded and treated them as owners of the said note. Yet Gray & Co., are not entitled to retain the proceeds of said note against the plaintiffs, who were the real owners, unless credit was given to Lake & Co., or balances were suffered to remain in their hands, to be met by this note

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or by such negotiable paper, transmitted or expected to be transmitted in the usual course of the dealings between the brokers houses of Gray & Co., and Lake & Co.

3rd. "In order to entitle the defendants to retain the proceeds of said note by virtue of their general lien as bankers, the jury must find from the evidence that the defendants made advances or gave new credit to the house of Lake & Co., on account of this note, or on account of the expectation of the transmission of such notes, without notice that this note was sent *for collection* merely by Lake & Co., as agents for the owners."

4th. "If the jury believe from the evidence that the collection of notes by the house of Gray & Co., for the house of Lake & Co., was only an occasional transaction; that the principal and legitimate business between said banking houses, was in buying and selling exchange on each other, pursuant to an agreement or arrangement made before the Griffin note was sent to the defendants for collection; and that defendants did not make any advance on said note to Lake & Co., or give Lake & Co., credit for any advances then made or to be made upon the deposit of said note with them, or upon the expectation of the transmission of such paper to the defendants by Lake & Co., in the usual course of their mutual dealings of a like nature, and that the plaintiffs were its real owners of said note, and endorsed it to Lake & Co., for collection only, and that the defendants have received the proceeds of said note from Griffin the maker, and have not, since receiving said proceeds, paid them over to Lake & Co., previous to the notice, if the plaintiffs interest in said note, then the jury will find for the plaintiffs and assess the damages at the amount of the note, with interest from the time payment thereof, was demanded of defendants, deducting first from the amount of the note the usual commission allowed to banking houses for collecting such paper."

5th. "The note in question not being a negotiable note by the laws of Missouri, the defendants in this action could not acquire a lien on the proceeds thereof, by virtue of the assignment of Lake & Co., made for the purpose of collection." The court overruled said instructions asked for by the plaintiffs, and refused to give them to the jury, to which overruling and refusal of the court, the plaintiffs then and there excepted and objected.

Whereupon the jury retired and found a verdict for the defendants.

The plaintiffs then moved the court for a new trial, and filed a motion to that effect, for and on account of the following assigned reasons:

"1st. That the court grossly erred in overruling the instructions asked by the plaintiffs, refusing to give them to the jury.

2nd. That the court erred in giving the instructions asked by the defendants to the jury.

3rd. That the jury found a verdict against law and evidence"

The court overruled said motion, to which the plaintiffs excepted, and the cause is here by appeal.

HILL for appellants.

1st. Lake & Co. as brokers and bankers in New-York in receiving notes for collection at a distance, necessarily undertook to employ *sub-agents* to make such collections, and this was the whole extent of their authority; and this the defendants had notice by the usages of banks, and the course of trade. So they became only *sub agents* of Lake & Co., and had no lien on this note, except by substitution, to the lien, of Lake & Co., for the fees of collection. Lawrence vs. Stonington Bank, 6 Conn. 521; Story's agency, sec. 388, 389 and sec. 14; Frazier vs. Erie Bank, 8 Watts and Ser., 32, 9 East. 12; 7 Bing. 284; 6 Mass. 430; 19 Ves. 299; 1 Rose, 154, 243, 232; 1 Bos. & Pul., 648, 546, Amer. Lead. Cas. vol. 1, 544; 1 Peters 5 C. Rep. 2930; 3 Howard 763, 6 Hoe & John. 146; 4 Ranle. 385; 23 Pick. 330; 12 Conn. 304; 3 Hill N. Y. 560.

2nd. This note was payable at the Bank of Missouri, St. Louis, and the employment of a sub-agent for collection was apparent from the face of the instrument, so that the defendants

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had no more right to suppose that Lake & Co. were the owners of this note from the endorsement of plaintiffs, than they would have had to suppose they themselves became the owners from the endorsement of Lake & Co., and the transmission thereof to them for collection.

3rd. The presumption of notice is clearly brought to defendants in this case, it was a county note not negotiable, payable at a distance, sent to defendants for collection, not put into circulation or discounted; and has not been treated as the note of Lake & Co. by defendants.

4th. Without the notice no lien can exist unless there is a general balance of accounts between the *customer* and the banker, in respect to other dealings of a like nature. The banker to enforce his lien against the *owner* of the note, must have given credit, or have made advances to the debtor, on account of this note, or in the expectation of the transmission of such paper. *Lawrence vs. Stonington Bank*, 6 Conn. 521. *Bank of Metropolis vs. New England Bank*; 6 How. 222; 3 Howard 763.

5th. No such credit was given or advance made on this note, or on the expectation of the transmission of such paper, all the credit was given, under agreement to draw without funds.

6th. The note being payable in Missouri, must be judged by the laws of this State, and it was not negotiable and passed subject to equities. The lien of bankers as against the *true owners*, does not attach on negotiable paper, the words in the books are liens attach upon "negotiable securities, bills and notes."

7th. The court erred in excluding from the jury the question of implied notice of the note being sent for collection, and the question whether defendants had given Lake & Co. credit, or made advances to them, on this note, or in the expectation of the transmission of such paper.

LORD for defendants.

1st. The instructions asked for by defendants, and given by the court, contain a true exposition of the law of this case.

The note was endorsed by plaintiffs, over to Lake & Co., or what was equivalent to it, endorsed in blank and by Lake & Co. to the plaintiffs; they became the bona fide holders of it, and had a right to credit the amount paid upon it, to Lake & Co., and to hold the same in payment of the debt due them by Lake & Co., so far as it would go. *Lake vs. Clark*, 11 Mo. 97; 16 Peters; 1 Story on promissory notes, sec. 195, page 215, note 1, and cases there cited; 1 Barr 452; Chitt. on bills 112. See Halcombe and Gholson's Ed. Smith's mercantile law, page 258. Note by American edition; 3 Dowling 750.

2nd. The amount of the note having been received by Gray & Co., and credited to Lake & Co., before any notice of the failure of Lake & Co., was payment by Gray & Co., to Lake & Co. of the amount. See case of *Carlisle vs. Wirhart* 11 Ohio 172, and the able review of authorities cited by Peck, council; 11 Connecticut 388.

This question would never have been raised, had Gray & Co. remitted the amount of the Griffin note to Lake & Co. when received, this was certainly all they were bound to do; now the crediting of the amount paid to Lake & Co. on their indebtedness, was the same thing as payment. *Lake vs. Clark* 11 Mo. 97; 16 Peters 15, 22, and authorities there cited and commented on.

See opinion of Williams Jus.; *Cranch vs. White* 6 Carrington and Payne, 767; 25 Eng. C. law, 641; 5 New Hampshire 159; a part indebtedness is a good consideration.

3d. Bankers have a general lien upon all the securities of their customers coming to their hands. 1 Howard 234; 6 Howard same case; *Bennett vs. Brand* 46 English Com. law 630; same case 54; English Com. law 436.

The case of the New England Bank against the Bank of the Metropolis, reported in 1 Howard, was not as strong a case as this, for in that case it appears, that the Bank of the Metropolis was notified, before the paper fell due, that the paper that had been remitted by the

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commonwealth Bank was owned by the New England Bank. Banks do not buy negotiable paper of one another. The case clearly recognises the doctrine that bankers have a lien on all papers coming into their hands. See also 1 Esp. p. 66, 5 term 438, 491, 493.

4th. The instructions asked for by the plaintiffs were properly refused by the court.

The first instruction was properly refused, because it is not law applicable to the facts of this case, because there was no evidence to support it.

The second instruction is not law, proceeding as it does, upon the hypothesis that a part indebtedness is not a good consideration. The case of *Swift vs. Lyon*, 16 Peter, as well as the case of *Lake & Clark* 11 Mo., to show that a part indebtedness is as good a consideration as a present advance.

The third instruction is not law, for the same reason as last above mentioned; it admits the lien of Bankers, but denies that there is any lien, for part indebtedness, but only for present advances.

The fourth instruction is not law, or if, as an abstract proposition, it be law, it does not apply to this case.

1st. It seems only to reiterate the doctrine attempted to be drawn from the 2nd and third instructions; that a part indebtedness is not a good consideration.

2nd. The amount was paid by Gray & Co. to Lake & Co., before this suit was brought. The credit given to Lake & Co. was payment just as much as if the amount had been paid then in specie, and

3rd. The defendants never had any notice of the plaintiff's interest in the note.

It came to them regularly endorsed to Lake & Co., who claimed to be the owners by endorsing it to Gray & Co. The paper was put in circulation by Odell and Frink, they clothing of Lake & Co., with all the evidence of ownership, and it would be perpetrating a gross fraud to say that because Lake & Co. have failed, they may recover from the endorsee of Lake & Co. who received the money, in pursuance of such endorsement, and paid over to Lake & Co., or what is the same thing, credited it on an indebtedness due them from Lake & Co.

The fifth instruction *assumes* that the note was not negotiable. To this I say,

1st. The note is not a negotiable note by the law merchant. The note was made in New York, and by the law of New York, was a negotiable note. 19 Johnson Rep. 144; 9 J. R. 120; Chitty on bills 195, 197; 10 Am. from 9th London Ed., and if negotiable in New York, negotiable every where. See Chitty on bills, Ed. as above; 167 Story's conflict of laws, 263, 264, 343, 345, 346.

If the note is not negotiable still it was a promissory note, (see note to Smith's Mercantile law, ed. by Halcomb and Gholson, page 208,) and by endorsing it to Lake & Co., Odell and Frink parted with all their property in it. The assignment was absolute, for if not, it would operate as a fraud upon all the subsequent holders. If Odell and Frink wished to make a limited or restricted assignment, they should have so expressed it upon the instrument. See laws Mo. 1845, under the head of bonds and notes. Sec. 2 page 190.

Judge BRACH delivered the opinion of the court.

The authorities to which we have been referred shed but a faint and ambiguous light upon the question presented by this record. The testimony is equally inexplicit and unsatisfactory, concerning the existence of any general custom upon which we might predicate a rule in this and similar cases; and the bankers themselves seem to have viewed the transaction, whilst it was in progress, each in a different point of view.

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We have not been exempt, therefore, from the solicitude so naturally inseparable from the exercise of what may seemingly be regarded a species of judicial legislation, under circumstances where we can bring to the task but little practical observation, or business-like reflection. It has seemed to us, however, that, as a general proposition, a blank endorsement, under the circumstances disclosed in this suit, should be held, *prima facie*, equivalent to an assignment for value, subject to be filled up by any subsequent assignee, and that, consequently, the defendants may have been justified in so treating it, and giving credit to Lake & Co., accordingly. We are of opinion, notwithstanding, that the plaintiffs should have had, with the jury, the more unequivocal and *explicit* recognition and benefit of any testimony in rebuttal of the presumption alluded to, by having had accorded to them, and given in connexion with the instructions of the defendant, at least the first one which was asked for by the counsel for the plaintiffs.

For the error thus indicated, and in order that the case may be tried upon instructions so plain that the jury may *readily* comprehend their import, the judgment of the court of common pleas is reversed and the cause remanded.

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Twenty contiguous years adverse possession of land, confers upon the possessor an *absolute title* against all persons not excepted by the terms of our statute of limitations.

ERROR TO ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

This was an action of ejectment. The plaintiff below declared for about fourteen feet of ground lying on the east side of main street in St. Louis, "bounded on the south by the southern line of Clamorgan's survey," and north by a lot formerly of James McGunnege, deceased. He gave evidence that he had been in possession of said land from 1825 to 1847; and there was also evidence tending to show that the northern line of his possession had been fixed and established during the life time of James McGunnege prior to 1825, and that ever since that time

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his possession had been co-extensive with that line. Plaintiff also read in evidence several deeds from Brady & McKnight, and subsequent grantees, conveying to him the lot lying on the east side of main street and bounded on the north by the lot of James McGunnege. It was admitted that defendant below was in possession of the premises in controversy at the commencement of the suit.

The plaintiff in error (defendant below) gave in evidence a survey of the lot confirmed to Clamorgan, and showed that the southern part thereof, fronting westwardly sixty feet on Main street, and bounded south by the southern boundary or line of Clamorgan's survey, was conveyed by McKnight & Brady to Moses Bates, and by intermediate conveyances rested in defendant below—the confirmation to Clamorgan and the derivative title of plaintiff in error are shown by the record, the southern line of Clamorgan's survey being the southern boundary of the lot of plaintiff in error. That in 1847 plaintiff in error commenced against the tenant of Mellon an action of ejectment to recover the very lot of ground described in the declaration filed in this cause. That said tenant was served with process and gave notice thereof to Mellon, who however, did not defend the action, but judgment by default was taken therein and perfected against the tenant; and Biddle entered into possession of said premises by virtue of said judgment, and continued possessed thereof at the commencement of this suit.

So that the case is shortly thus: plaintiff shows that he and those under whom he claims had been in adverse possession of the land in controversy for more than twenty years next preceding the month of July, 1847.

Defendant shows himself to be clothed with the documentary title to the premises, regularly derived from the confirmee thereof; and that he recovered possession of the premises by a judgment in ejectment commenced in 1847, against the tenant of plaintiff, plaintiff having notice of the action; and that he was at the time this suit was commenced so possessed thereof.

At the instance of the plaintiff the court instructed the jury as follows: 1st. If the jury believe from the evidence that Tho's. McKnight, claiming to be the owner of the lot in dispute, and James McGunnege claiming to own the lot north of the one in dispute, fixed upon the present division line between said two lots as far back as 1822, as the correct line of division between said lots, and that said McKnight with the knowledge of said McGunnege built the stone house on said lot the north wall running along said line, and enclosed his lot in continuation of said line and with the acquiescence of said McGunnege and the subsequent owners of said lot occupied said lot of McKnight down to the year 1847 or 1848, then said line as then fixed must be taken as the true line of division between said lots, and the defendant cannot at this late day dispute the correctness of the location of said line against any one claiming under Thomas McKnight.

2nd. After fixing the boundary between adjoining lots by the owners thereof, and quiet occupancy of said lots, according to such boundary or division for the space of twenty-five years, neither proprietor can object to the location of such division line, but the same is to be taken as correctly located." And of its own motion the court instructed the jury, as follows: 1st. He who takes and maintains the possession of land, always claiming it as his own, and exercising such acts of dominion as indicate that they are done in the character of owner alone, holds adversely to all others, such a possession, if full, actual and notorious, and uninterrupted, and continued for the period of twenty years, confers a positive title. If, therefore, the jury shall believe from the evidence, that the plaintiff and those through whom he claims had such a possession of the land in the declaration, mentioned for the space of twenty years, consecutively up to the time of the entry of the defendant under the judgment, recovered against the tenant of the plaintiff, they will find for the plaintiff, notwithstanding, the defendant's entry, and continued possession under and by virtue of the said recovery.

To the giving of which instructions, defendant excepted at the time. The defendant then asked the following instructions, (which the court refused and the defendant excepted the refusal,) viz: 1st. The jury is instructed that although a prior possession under a claim of title, and not voluntarily abandoned will prevail in ejectment over a subsequent entry without

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any lawful right: Yet where the subsequent entry and possession of the defendant are acquired by virtue of a recovery in ejectment they afford a better presumption of title than the prior possession; and if the defendant thus in possession by virtue of the recovery in ejectment produce and show himself to be clothed with the legal title to the premises the plaintiff relying on mere possession prior to the ejectment cannot prevail against him.

2nd. If a party clothed with the legal documentary title to land be in possession thereof under a judgment and execution of a court of competent jurisdiction in ejectment, he can defend that possession against any one clothed with the new title by possession for twenty-two years prior to the inception of the ejectment suit and whose tenant was ejected in that suit.

The verdict being against defendant he filed a motion for a new trial, assigning as a reason therefor: the error committed by the court in giving and refusing the instructions asked for at the trial, which motion the court overruled and defendant excepted.

GANTT for plaintiff.

Upon the case as stated the plaintiff in error, by his attorneys, insists:

1st. That the person clothed with the true paper title to land may, in ejectment, defend the possession thereof against the world.

2nd. That if the person clothed with the documentary title, recover by ejectment the possession of the land which has theretofore been held adversely to him, he may defend that possession although such adverse possession may have continued twenty years prior to the institution of proceedings in ejectment against whomsoever.

3rd. The right of property is shown to be in Biddle. The right of possession is what he recovered in the ejectment, together with the possession itself; and he was therefore invested with the "juris and seisinac conjunctio," which constitutes a perfect title to lands. 4 Har. and McH. 123.

4th. The person who has been in adverse possession of lands for 20 years can hold them as defendant against the real owners, but unless such adverse holder be clothed with the possession itself, his prior possession shall not avail against the owner in possession. Such possession being taken according to law.

5th. By virtue of the act of limitations, no positive right or title is acquired by one party, but only the remedy for the recovery of the lands is taken away from him who hath the true bill. But if he who hath the true bill be in possession, he needs no remedy to recover that which he has already, to wit, the possession; and if he hath also the title "*justa causa possidendi*," he cannot be dispossessed.

In support of which propositions he cites the following authorities:

3 Cruise's Digest, 490, 491; 16 Johns. Rep. 314, Jackson vs. Rightmyre; 7 Cowen's Rep. 737, 642, Jackson vs. Walker; 6 Cow. 764, Jackson vs. Miller; Blackstone's Reps. 678, Davenport vs. Tyrrell; 2 Blackstone's Comm. 198, 199; 5 Cowen's Rep. 200, Jackson vs. Deun; Ridgely's lessee vs. Ogle et al., 4 Har. & McH., 123.

DICK for defendant.

In 3rd Cruise's Digest, 495, sec. 21, it is said: "An uninterrupted possession for twenty years, not only gives a right of possession which cannot be divested by entry, but also gives a right of entry. So that if a person who has such a possession is turned out of it, he may lawfully enter and bring an ejectment for its recovery, upon which he will be entitled to judgment. Thus a possession for twenty years in this case forms a positive prescription." In the same volume at p. 506, and in Atkins vs. Horde, (Burrows, 119) Lord Mansfield, in giving the opinion of the court, says: "An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for

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the want of it under some of the exceptions allowed by the statute. Twenty years adverse possession is a *possession title* to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession."

The case of Jackson E. Dene, Wright vs. Dieffendorf, 3 Johns. R. 269, is a case which, in its particulars, bears the closest resemblance to that now before this court. Admitting for *the sake of argument*, that the plaintiff by an erroneous survey, got into possession of land other than his own, and the case is like that now cited. In that case, as in this, the then plaintiff had been ejected by an action brought in which judgment by default had been rendered against him, and then brought his ejectment upon the title given him by his possession. The opinion of the court given in that case is as follows:

"Shall a possession of 38 years be disturbed, because from a recent survey it appears not to correspond with the partition deeds executed sixty years before? Shall not the parties to that partition, and all those who claim under them, be concluded by so long an acquiescence? It is unquestionably the true rule, and every legal presumption, every consideration of policy, requires that this evidence of right should be taken to be conclusive. A location made in 1765, and probably in exact conformity to the survey made on the partition in 1744, and quietly suffered to be continued by the proprietors of the adjoining lot until 1803, is, and ought to be final and conclusive. These circumstances furnish the best and most satisfactory evidence of the true line of division between the two lots. This general doctrine will not be denied, and the only question is as to the application of it to the present case. What is to be the effect upon this title, on the recovery in ejectment by default, and an entry pursuant thereto in 1803? This is the real point in dispute between the parties. The recovery in 1803 against the lessors of the plaintiff does not conclude them from setting up this evidence of title. The amount of a recovery in ejectment is accurately and forcibly stated by Lord Mansfield in the case of Atkyns vs. Horde, (1 Burr. 114.) It is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterwards appear even between the same parties. He who enters under it, in truth and substance, can only be possessed according to right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a tenant. If he has no title, he is in as a trespasser. If he had no right to the possession, then he takes only a naked possession. This is the obvious and established construction of the nature and effect of a judgment in the action of ejectment. It follows, therefore, that Wright, one of the present lessors of the plaintiff, lost the possession only, without prejudice to the right. The right under the location, after the possession and acquiescence therein, remains in the lessors of the plaintiff, and is not impaired by the recovery in 1803. The plaintiff must, therefore, have judgment." The case of Wheeler vs. Ryerss, 4 Hill, 466, and same case affirmed in, 25 Wend. 437, also decides what is decided in 3 J. R. 269, Jackson vs. Dieffendorf. The case in Hill, 466, and 25 Wend. 437, is as follows: "The plaintiffs had had a previous possession, which was, however, short of 20 years. An action was brought against their tenants, of which it did not appear that the plaintiffs had notice. A trial was had in *the first case*, and judgment rendered in favor of the former plaintiff and defendant. Upon action brought to regain the land, the plaintiff recovered *remedy upon his former possession* short of twenty, and it was held that the *judgment against his tenant did not raise a prima facie case against the plaintiff*. So in the case of Jackson vs. Rightmyre, 16 J. R. 314, the plaintiffs previous possession had been but seven years, against which the defendant had been in possession for 18 years under a judgment by default, obtained eighteen years previously against the plaintiff. The court, in its opinion, say: The plaintiffs and their ancestors have a prior possession of 7 years from 1783 to 1790, to set up against the subsequent possession of the defendant of eighteen years. Here is no possession on either side which has been long enough to have ripened into a right of possession, or sufficient to toll the entry."

At p. 326 the court say: "A recovery in ejectment does not injure the right of the parties, as it may be made to appear afterwards, but it certainly does change the presumption of right founded on a *new prior possession short of twenty years*." Refers to Jackson vs. Dieffendorf,

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3 J. R. 263, above quoted, and approves it. The case of Pederick vs. Searle, 5 Sergeant & Rawle, 236, is a case directly deciding that *twenty years possession confers title*, and that an ejectment on such title may be maintained against the defendant in possession, who has gotten such possession by an ejectment. This case directly refers to the leading case of Jackson vs. Diefendorf, 3 J. R., and supports it. In this case of Pederick vs. Searle, the plaintiff gave in evidence a complete title coming through Samuel Dewitt; and that Dewitt had brought his ejectment against the defendant, and recovered possession of the land; that the defendant retook possession of the land; the defendant offered to prove twenty-one years adverse possession to show title in himself; but this evidence in regard to possession was excluded by the court below. The supreme court, at p. 239, in delivering their opinion, say, that although a judgment in ejectment had been recovered against the defendant, yet he offered to show *that he had actual title by twenty-one years adverse possession*, which he should have been allowed to do. In this opinion, the following language is used: "For the right of possession is acquired by twenty-one years possession, and this right is not only sufficient to support a defence, but *is a positive title*, under which one may recover as plaintiff in ejectment. This was the very point decided in Stokes vs. Berry, 1 Salk, 421."

In the case of Jackson vs. Oltz, 8 Wendell, p. 440, the plaintiff had not the paper title to the land sued for, but had twenty years possession of the land, claiming it as his own, and owned adjoining land. He recovered the land upon the actual title to it, given him by his twenty years possession. The language of the court is this: "If the possession was adverse, and had been so for more than twenty years, as it had in this case, then that possession *ripened into a title*, and the plaintiff must recover of the defendant, though the paper title to the land be not in him." Here the court in the clearest language state that the twenty years possession gives complete title. A possession is mere *prima facie* evidence of title, and continued short of twenty years, merely continues to be a presumption of title, but when that presumption has continued for twenty years or upwards, then it *ripens* into a complete title. A party then has no longer a mere appearance of having title, but has the true real title. This view of the law is presented by Ch. J. Kent; in Smith vs. Lorillard, 10 J. 11, 356, wherein delivering the opinion of the court, he says: "The ejectment is a possessory action and possession, is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possession of land has in the first instance, and after a continued possession for twenty years, under pretence or claim of right, the actual possession ripens into a right of possession, which will toll an entry;" and immediately below this he speaks of a possession which cannot be over reached.

In the case of Jackson vs. Harden, 4 J. R. 210, the defendant to defeat the recovery of the plaintiff offered to show an outstanding title in a third person, against which, however, twenty years adverse possession had run. Kent, justice, in delivering the opinion of the court, at p. 211, says: "But if the defendant could be permitted to set up this defence, (that is of an outstanding title) the next inquiry is whether what he offered to show was a subsisting title. It was upwards of twenty years between the time that Ludlow is stated to have acquired the Salisbury title under a judgment and execution, and the time of trial when the testimony was offered; and I believe the rule is, that when upwards of twenty years of adverse possession have run against an outstanding title, it shall not be set up. Buller's N. P. 110, 3 J. R. 386. The presumption in that case is, *that it is no longer a subsisting title.*"

That is, the court, in its opinion delivered by Kent, decide that a title against which twenty years adverse possession have run is extinguished. Here then is the proposition decided in both ways; it is decided expressly by many decisions, and here its correlative is also affirmed; for the creation of one title by twenty years occupancy, works the extinction of the others. The supreme court of Missouri, in the case of Crockett vs. Morrison, 11 Mo. Rep. 7, states that twenty years adverse possession gives title, and it is ranked along with documentary title. This language is used by the court: "It is essential to sustain the action of ejectment, that the plaintiff should have a right of entry. Where the plaintiff has a *documentary title or a title*

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growing out of an actual adverse possession for twenty years, this right of entry cannot be tolled except by the bar of the statute of limitations." Here the court speaks of two kinds of title which gave a right of entry, and both as complete titles; and no entry can toll the right of entry given by twenty years adverse possession which will not toll the entry from the documentary title. In this case now before the court, the defendant is insisting upon having his possession obtained by his judgment by default tacked to his extinct title. But the plaintiff says no, in the language of our supreme court just cited. I have title to the land growing out of an actual adverse possession for twenty years, "and this title is accompanied with a right of entry, without which it would be useless; and this right of entry cannot be tolled except by the bar of the statute of limitations." The right of entry issues from title; the defendant Biddle had no title when he brought his ejectment; therefore, he had no right of entry; by our tenant's default he obtained an entry; how could his entry which was attached to no title, re-vivify an extinguished title. The defendant, Biddle, is contending that because he was in possession he had a right of entry, and because he had a right of entry he had title. But this is false reasoning, though very specious. But it is a mere begging of the question. His entry proves no title, nor raises a presumption even of the title, when it is against a subsisting title not barred by the statute of limitations.

In the case of Chiles vs. Jones, 4 Dana, 483, the court say: "It is also well settled that twenty years uninterrupted adverse possession of land, not only tolls any right of entry which others laboring under no disability may have had in the land while it was so possessed, but that it also confers upon the possession, as well as to those to whose use his possession enures a perfect right of entry, and consequently right of action to recover the possession in case he has been ousted from it. The right of entry has been destroyed in the outstanding title, and is conferred upon and enures to the benefit of the possession. And as the right of entry and of possession are alone triable in the action of ejectment, the possessor for twenty years clearly made out must prevail." Refers to 3 Marshall, 30, Roberts vs. Sanders.

Philips on evidence, vol 4, p. 265, says: "An uninterrupted possession of twenty years is conclusive of the right upon a trial of an ejectment, either for the plaintiff or the defendant." In 2nd Starkie Ev. 294, in stating what it is sufficient for the plaintiff in ejectment to make out, says: "In analogy to the stat. 21 Jac. 1 C. 16, a clear undisturbed possession of twenty years is evidence of an estate in fee, if no other title appear, and upon such evidence a plaintiff may recover an ejectment. The presumption of title resulting from such possession of twenty years is liable to be rebutted by evidence that the possession was not adverse to the party legally entitled, or that the latter labored under some disability when his right accrued, which has continued down to a period within twenty years." In this text book of lawyers, which they look into as a guide for the course to be pursued by them in conducting a trial in court, they are told that a plaintiff can recover on the adverse possession of twenty years against a defendant clothed with the paper title, unless the defendant is within the savings of the statute. In the case of Jackson vs. Miller, 6 Cowen, at p. 754, the court say that a possession of twenty years adversely of law, is evidence of title good against a previous recovery. 1 Greenleaf Ev. 76, sec. 15, sec. 16, it is said the possession of land for the length of time mentioned in the statute of limitations, under a claim of absolute ownership, constitutes against all persons but the sovereign, a conclusive presumption of a valid grant. So in 4 Kent's Com. 187, he says: "The statute of limitations is assumed as the fit and proper ground for taking the length of possession therein mentioned as the presumption of right." That is, when a party has been so long in possession of land claiming it as his own, and undisturbed by any one, that he thereby is conclusively presumed to have title to it, and this presumption is a grant of title in effect.

The case of Roberts et al. vs. Saunders, 3 A. R. Marshall, page 30, is an action in circumstances much like the present. In that case the plaintiff entered upon and occupied the land for upwards of twenty years, claiming it as his own, but he had not the paper title. An ac-

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tion of ejectment was brought against his tenant, and no notice given the plaintiff (then defendant) and the tenant not defending, judgment went against him. Saunders then commenced his action to recover the land on the ground of title acquired by twenty years possession, which possession he had thus lost by the default of his tenant, and the court decreed that although the party, Roberts, against whom he brought the ejectment, had the elder paper title, that Saunders had complete title *by twenty years possession*, and so must recover. The court say at p. 30, "Saunders and those through whom he claims, must be admitted to have held a continued adverse possession of the land in contest for more than twenty years, under color of title; and it is well settled that such a possession not only tolls or bars any right of entry which others, laboring under no disability, may have had in the land whilst it was so possessed; but that it moreover confers upon the person possessed, a perfect right of entry."

In support of the proposition stated in the second instruction given for the plaintiff, the following cases are cited; Jackson Ex. dem. Wright, vs. Deiffendorf, 3 J. R. 269. This case has already been set out in this brief. Jackson Ex. dem., Schuyler vs. Vedder 3 J. R. 8, a case which by mistake in the survey, the parties took possession of their land by wrong boundaries and so continued to occupy for upwards of twenty years; the court say, that after such long acquiescence in boundaries, fixed by the parties, they are concluded from contesting with each other their boundaries. In the case now before the court, the deposition of Thomas McKnight, proves that the owners of these two adjoining lots had the line of division between them run as early as 1818, and according to this line McKnight built his two houses, and this is peaceably acquiesced in down to 1847, a period of between 29 and 30 years. It was also proven by the testimony of the different witnesses of the plaintiff, that the lot in dispute, as part of a larger lot, was actually enclosed by a fence, on the north line of which the fence run from the year 1823, to 1847, and up to the trial.

In the case of Thompson vs. Milford, 7 Watts 442, it is decided, "while one holding under a survey makes his boundaries on the ground, including 12 acres of his neighbors land, and the neighbor permits him to fence and occupy it for more than twenty-one years, it was held that a title was acquired by such occupancy to all the land within his boundary, the wood land as well as that cleared, though his neighbor held the land by patent and by actual settlement."

In Brown vs. McKinney, 9 Watts 565, the court decided where adjoining towns have occupied up to a line fence between them for more than 21 years, each has a right up to that line, whether they knew of each others adverse claims or not." In many cases in reference to holding lands by division lines wrongfully located, it has been decided, that a possession short of twenty years according to such lines as erroneously located precludes the parties disputing the correctness of the line; and in no case when such occupancy has continued for twenty years, has it been held that such location could be questioned; that is, some courts have held the parties concluded short of twenty years possession, and in every case, twenty years occupancy according to fixed lines, though erroneous, has been held to conclude the parties, and give them title according to their occupancy. In the case last cited, Brown vs. McHenry, 9 Watts, at p. 566, at the close of the opinion, the language of the court is this:

"For it cannot be disputed that an occupation up to a fence on each side by a party or two parties, for more than twenty-one years, each party claiming the land on his side as his own, gives to each an incontestible right up to the fence, and equally, whether the fence is precisely on the right line or not. It is time that it should be settled beyond dispute, that where a person in possession by a fence as his line, or by a house or stable for more than 21 years, his possession establishes his right."

Judge BIRCH delivered the opinion of the court.

We are of opinion that twenty continuous years adverse possession of land, confers upon the possessor an *absolute title*, against all persons

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unexcepted by the terms of our statutes. The instructions given by the circuit court were therefore correct, as was also its declension to give those asked by the defendant, and its judgment is consequently affirmed.

I give no opinion in this case.

J. F. RYLAND.

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1. An indictment for a violation of the 4th sec. of the "act to prevent illegal banking, and the circulation of depreciated paper currency, &c.," which describes the offence in the words of the act is good.
2. Several persons may be jointly indicted for a violation of the "act to prevent illegal banking, and the circulation of depreciated paper currency, &c."
3. Where an indictment for a violation of the 4th sec. of the act to prevent illegal banking describes the offence in the words of the act, a general conviction or acquittal, would constitute a bar to a subsequent indictment for a similar offence, during the period covered by the terms, and intendment of the averments in the former indictment.

APPEAL FROM ST. LOUIS CRIMINAL COURT.

LACKLAND for the State.

In this case the motion to quash, raises five questions, although there are seven reasons set out in the motions. Which five questions go to the sufficiency and validity of the indictment.

1. That the indictment is bad, because, although the facts therein, alleged may be sufficient to constitute an offence, the description of the bank notes is insufficient.
2. That the indictment is bad, because the facts alleged, therein, constitute no offence.
3. That the indictment is bad, because there is no sufficient venue.
4. That the indictment is bad, because there is no sufficient statement of time.
5. That the indictment is bad, because the defendants were jointly indicted for separate offences.

As to the first question, it is contended the indictment is good. It follows the words of the act creating the offence, which as a general rule is sufficient, and is contended to be sufficient in this case. *State vs. Bougher*, 3 Blackf. 307; *U. States vs. Wilson*, Bald. 78; *State vs. Lancaster*, 2 McLean 431; *State vs. Duncan*, 9 Port. 260; *State vs. Mitchell*, 6 Mo. 147; *State vs. Helm*, 6 Mo. 263; *State vs. Noel* 5 Blackf. 548.

An indictment charging a statute offence in the language of the statute, and so plainly that the

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nature of the offence may be understood by the jury, is sufficient. *Chambers vs. People*, 4 Scam. 351; *Camp vs. State*, 3 Kelley 417.

As to the second question, it is contended the description of the bank notes is sufficient, they are described in the words of the statute, and it is not necessary to set them out in the indictment. It is not necessary in an indictment, for vending or publishing lottery tickets to set out the ticket in the indictment, and there is nothing in the character of this offence requiring more particularity than in the case of vending or publishing lottery tickets. *State vs. Fallet*, 6 N. Hamp. 53; *State vs. Eaton*, 15 Pick. 273; *People vs. Taylor*, 3 Den. 91; *Clapp vs. State* 5 Pick. 41; *Commonwealth vs. Johnson*, Thather crim. cases, 284; 8 Mo, 606; 8 Mo. 697.

As to the 3rd and 4th questions raised by the motion to quash, it is contended that the allegations of time and place are sufficient. They accompany the allegations of the offence. It is not necessary for the allegations of time and place to accompany mere matter of description.

As to the 5th question, it is contended, that there is in the indictment a misjoinder of parties in other words, that the indictment is bad, because it alleges an offence to have been committed by more than one, which in its nature, could only be the offence of one. The offences of passing and receiving paper currency in bank notes of less denomination than ten dollars, is an offence which may as well be jointly committed as the offences, larceny, burglary, murder or manslaughter, or the keeping of a ferry without license. This court in the case of *State vs. Vaughan*, 4 Mo. 530, decide that two cannot be jointly indicated for carrying on the business of an auctioneer without license, because the party who cries the goods or sells the goods at public outcry, is in law the auctioneer. And that the crying or selling the goods at public outcry is an act, which in its nature, cannot be jointly done. Another case of this class is cited, the case uttering slanderous words and cases of perjury. This court in 10 Mo. 440, decide that more than one can be indicted for keeping a ferry without license, and it is contended that the present case is similar in principle.

HAIGHT for defendant.

1. The indictment does not set forth the offence with that particularity, and certainty required by the old or modern forms. There is not a sufficient statement that the court can judicially see that an offence has been committed. The offence is the passing a bank note or other paper currency of a less denomination than ten dollars. It is the description of the instrument that creates the offence. The gravamen is the kind of paper. What is or is not a bank note, will be a question of law when the facts are ascertained. There is no technical statutory description of a bank note, and if there was it would not be the less necessary that it should be described. The gravamen is not as in larceny, the value of the thing taken. The gist here, is that the paper must be such as may be used as currency. There may be and doubtless are many notes made by banks, and therefore, bank notes not within the prohibition of the act. A bank may make a note not negotiable, and therefore, not capable of entering into the currency of the country. The gist here, is the same as in forgery. It depends upon the kind and character of paper, whether there is an offence, and it cannot be known unless the kind of paper is described. The defendant cannot know what he is to meet any more than he can in forgery, unless the paper is described. It never was deemed sufficient in forgery, to aver the false making, &c., of a promissory note for the payment of money—the note is either set forth or so described, that it may be seen to be an offence. The defendant has a right to know what bank issued the note and all those particulars which go to define the offence. In *Wales vs. the State*, 10 Mo. 498; and in *Austin vs. the State*, *ibid.* 596, the true rules are stated and their application to this case is manifest. In some cases a more particular description may be executed by proper averments in the indictment—as that the note is lost or destroy-

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ed, &c. In this case for any thing that appears, the prosecutor has the notes, and yet they are not described.

2. Each count in the indictment contains several distinct offences. The offence is created by passing any bank note of a less denomination than ten dollars, the indictment states various offences of this kind, with various individuals in one and the same count. This is duplicity and not allowed. 15 Pickering Rep. 273. This case is referred to, because it may be supposed to aid the State, and because it contains the rule on the subject of duplicity. That it is no authority for the general pleading adopted in the case is apparent from the point made, being duplicity only, and the indictment is not set out. 23d. Wendell 418, contains the form of an indictment for selling lottery tickets, and the ticket is set out. Case cited by State, 3d Denis 91; *People vs. Taylor*, contains the general rules, and their application; see *People vs. Payne* 3d Denis 88.

3. The defendants if convicted or acquitted, could not plead the judgement in bar, because there is no sufficient description of the offence.

4. The defendants are indicted jointly for an offence several in its character and necessarily so.

5. The indictment does not shew any offence whether the statute does not specify that the particular notes were promissory or ordering the payment of money or other thing, "being then and there the currency," what does this mean? Its legal and constitutional meaning is gold and silver coin.

6. The second is clearly bad, in not alleging the receiving within the State. The omission of the words then and there is fatal.

Judge BIRCH delivered the opinion of the court.

The defendant in connexion with three others (partners doubtless but not so stated) was indicted for having violated the fourth section of the "act to prevent illegal banking and the circulation of a depreciated paper currency." The indictment contains two counts. The first charging the defendants with passing and the second with receiving, bank notes promissory of the payment of money of less denominations than ten dollars, the same being then and there currency &c. Presbury alone was served, but the motion to quash and the bill of exceptions being alike personative of *all* the defendants, we shall treat the case here as though they were all jointly and each for himself, complaining of the impropriety and insufficiency of the indictment, leaving the question as to what other effect, if any, shall be given to such a quasi appearance, to be determined (if necessary) hereafter.

The ground of the motion were want of sufficient venue, insufficient description of the offence, misjoinder of defendants, and general informality. The motion was sustained and the State appeals.

The first point has relation to the second count only, in which the venue is to us sufficiently apparent, aberrated, or otherwise reduced to its essence, it would read, that "the defendants, at the county of St. Louis aforesaid, unlawfully did receive" &c. As the courts of the State

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will judicially take notice of the names of its several counties, and as the indictment otherwise imports to have been found by "the grand jurors of the State of Missouri, within and for the body of the county of St. Louis," we are unable to perceive in what respect this averment is substantially defective or objectionable.

Concerning the second objection, namely, the want of particularity and certainty respecting the kind of notes received and passed by the defendants, this court has heretofore held, and it has been almost every where holden, in reference to analogous statutory offences, that averments in substantial conformity with the terms of the act were all that was necessary in charging the commission of an offence thereby created. We perceive no reason for departing from the rule thus established in the case before us, but much to induce an adherence to it. The statute, in unambiguous, every day terms, creates and defines the offence and denounces the penalty for its infraction. The indictment in like terms, understood by every body, charges the defendants with having committed the offence and incurred the penalty. Had issue, therefore been taken, as it should have been, the question for the jury would have been a simple one, namely, did the testimony support the indictment, that being in the very words of the law? If so, the defendants were guilty of violating that law, and courts should be slow to lend themselves, when acting under statute of this nature, to a strictness so technical, if not obsolete as to embarrass if not defeat, in most instances, the very end and aim of the law giving authority. So far from censuring, we think the attorney for the State did well in foregoing the unnecessary task of attempting to describe the notes; for had he done so, and from any cause failed upon the trial to sustain the description, we need scarcely refer to the rule which might have well justified the judge below in directing an acquittal.

To our apprehension, the gravamen in this case consists, as set forth alike in the law and the indictment, in giving currency to "bank notes" under ten dollars. The applicability, therefore, of former opinions of this court, in the cases referred to by the defendants counsel, is not as "manifest" to us as it seems to have been to him. In the indictment before us, the averment in the first count is, that the defendants passed to various persons, designating them by name, and to various others unknown to the jury, forty bank notes of the denomination of one dollar, forty of the denomination of three dollars and forty of the denomination of five dollars. The second count is substantially as the first one, except that the averments are for receiving such notes from the persons

mentioned and others unknown, and both allege the said notes to have been "then and there currency" &c. Surely it appeared thereby, with "sufficient judicial certainty that the indictors had not gone upon in sufficient premises," and that the indictment was "a plain brief and certain narrative of an offence alleged to have been committed by the defendants."

Respecting the point thirdly relied upon by the counsel for the defendant, it was competent and proper, in our estimation, for the grand jury to proceed either against the most prominent offending member of the banking house in question, or to include all the partners in the same indictment, according to the circumstances of the case.

We can well imagine reasons which would properly determine them to the one course or the other, and which would properly determine, also, the finding upon the trial, some guilty and others not, and this whether severing or standing together in their defence. In short, that is a discretion of which defendants cannot be heard to complain, for under other guarantees of the law it cannot possibly injure, but may greatly serve them. So, also, in relation, generally to the informal and unspecific nature of such indictments as the present, the State only incurs the risk of real detriment. In the case before us, not only would a general conviction or acquittal of the defendants, or either of them, be properly pleadable, by them or him in bar of a subsequent indictment for illegally dealing with the persons therein named, but in consequence of the averment that the defendants also thus illegally dealt with "divers other persons to the grand jurors unknown," such a finding would at least presumptively constitute a bar to any subsequent charge for a similar offence during the period covered by the terms and intentment of the averments in the former indictment. This would be so, we apprehend, as well if the second indictment particularised the offence by describing the notes, as if it were again drafted in but general conformity with the terms of the statute; so that whilst readily perceiving how it may happen, through the haste or inadvertence of the attorney for the State, that he may be estopped by a verdict upon a loose and general indictment from bringing a new and more specific one, there is no view of the case in which we can conceive that such a practice can work wrong or injustice to a defendant.

Upon the whole case, then, let the judgment of the criminal court be reversed and the cause remanded.

I agree to reverse the judgment of the court below, concurring in the main in the above opinion.

J. F. RYLAND.

PHILIP PIPKIN, Adm'r. of JOHN KEETON Dec'd. vs. JOHN H. CASEY.

PHILIP PIPKIN, ADM'R. OF JOHN KEETON, DEC'D. vs. JOHN H. CASEY.

The title of a *bona fide* purchaser of a slave from an administrator for a valuable consideration, and without notice of any fraud on the part of the administrator, is good.

APPEAL FROM WASHINGTON CIRCUIT COURT.

FRISSELL for appellant.

1st. That the court erred in permitting the transcript of the record of the court of pleas and quarter sessions of Franklin county, Tennessee, to be read in evidence.

2nd. That the transcript of the record of the supreme court of Tennessee was improperly excluded. A record of a judgment is always evidence between parties and privies. The suit in Tennessee was brought by S. Keeton's heirs against Wm. Keeton and others. This suit was brought by Philip Pipkin, representing John Keeton's heirs, against John H. Casey, assignee of Wm. Keeton, as to a negro in controversy, among other things, in the suit in Tennessee.

Whatever would be the effect of that judgment in Tennessee as to Keeton's sale of the negroes, it would have the same effect here. *McElmoyle vs. Cohen*, 13 Peters, 312, 325-6; *Vorhies vs. Bank of U. States*, 10 Pet. 449; *Mills vs. Donyer*, 7 Cranch, 481; *Philips on Evidence*, (Cowen and Hill) part 2, 895-6.

This doctrine holds as to foreign judgments of courts of competent jurisdiction. *Destrehan vs. Scudder*, 11 Mo. Rep. 490.

An administrator, by a sale of slaves, conveys no right except he proves the law in reference to such sales. *Ventris et al. vs. Smith*, 10 Peters, 161; and generally a person who sells a chattel can convey no other or greater title than he possesses himself. 1 John. Rep. 478, *Wheelright vs. Depeyster*.

COLE for appellee.

1st. The court committed no error in excluding the record in question from the jury. Because the proceedings was *inter alias acta*. The evidence was not pertinent to the issue, and, if admitted, would have misled the jury, and instead of a trial of property under Missouri law, we should have settled the question under the law of Tennessee. *Kilburn vs. Woods-worth*, 5 John. Rep. 37, *Mayhen vs. Hitcher*, 5 Cow Rep. 34.

2nd. As a corollary from the first point, Casey could not be bound by this record, because he was no party to the suit, nor was William Keeton served with process. And as to the evidence of fraud practised by Wm. Keeton, in the sale and purchase of John Keeton's slaves in Tennessee, if it were so, that could not impair Casey's right to Calvin, unless he was a party to the fraud of which there was no evidence, nor could there be any. *Hollingsworth vs. Barbour et al.*, 4 Peters Rep. 466; *Wilson vs. Jackson*, 10 Mo. Rep. 331.

3rd. Assuming the ground taken by appellant in his single and only exception, that the record was collateral evidence, and therefore should have gone to the jury; we say that being collateral, it was not, therefore, relevant evidence, if we do not mistake the import and meaning of the term used by the appellant, and therefore rightfully taken from the jury. (This will be apparent from mere inspection.)

4th. William Keeton, as adm'r. of John Keeton in Missouri, had all the interest in Calvin

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that the deceased had in his lifetime; and a sale by him would vest the title to the property in the purchaser. Blac. Comm. 2 vol. 510, Co. Litt. 209; Ovesfield vs. Bullitt, 1 M. Rep. 749; 7 M. Rep. 351; Griffith vs. Hozier, 2 Cond. Rep. 2.

5. The remedy of heirs, distributees, &c., in a case of waste by an administrator, is personal upon his official bond, and not against the purchasers of the property. 1 M. Rep. 749; 2 Bibb, 188, Henning vs. Conner; 2 J. J. Marshall, 203, Carrol vs. Connet.

6th. If William Keeton, adm'r., committed a fraud in the purchase of Calvin, this fraud cannot impair the title of John H. Casey, an innocent purchaser for a valuable consideration. Wineland vs. Coonce, 5 M. Rep. 296; 13 John. Rep. 471; 3 Bac. Ab. 307, 8, 9; Kean vs. Newell, 1 M. Rep. 754.

7th. If a fraud was committed by Wm. Keeton in Tennessee, the plaintiffs were *particeps criminis*, as the sale was made with their assent. (See the record) page 16, and at their instance in part.

8th. The case itself is stale, and barred by lapse of time. See Craig vs. Perry et al. 3 Mo. Rep. The possession of Keeton's being adverse, notoriously so.

Again: The suit in chancery in Tennessee, by the heirs of John Keeton, was commenced 19th February, 1839. The judgment below was reversed, and bill dismissed by the supreme court at Nashville on 3rd December, 1841. (See record, page 106.) See also page 43. Robert Lackey, husband of Martha Keeton, one of the heirs, receipt and discharge in full to Wm. Keeton, adm'r., date 30th March, 1841.

See also on page 42 the receipt of H. R. Bennett, the husband of Clarissa, another heir in full to Wm. Keeton, adm'r. date 17th November, 1839.

Again: See receipts on the records from all the heirs of John Keeton to Wm. Keeton, adm'r. of his estate, for their parts of the estate. The reason why I refer particularly to the receipts of Lackey & Bennett, is that the receipt of the first is after the dismissal of the suit in chancery in Tennessee, and the last during its pending, showing that they come perfectly cognizant of their rights and the relation in which all of them stood to Wm. Keeton.

The whole facts of the case being very full, entirely so I believe, as will appear clearly from the synopsis of the case by both the court of chancery and supreme court of Tennessee, with the exception of the bills of sale and receipts since supplied, it is requested with the utmost deference and respect on the part of appellee, that the supreme court would pass beyond the mere point of exception on the record, and extend their enquiries, and decision over the whole case as presented by the record. This course will save trouble and expense in other cases growing out of the same state of facts now pending in the circuit court of St. Francis and Jefferson counties. This request is not without a precedent; in the Mullanphy will case, Graham et al. vs. O'Fallon, it was done.

NAPTON, J., delivered the opinion of the court.

This was an action of detinue instituted by the public administrator of Jefferson county, who was directed by the probate court of that county to take charge of the estate of John Keeton unadministered.

The object of the suit was to recover a slave named Calvin, formerly the property of John Keeton deceased, but about the year 1844 or 5 sold by William Keeton, administrator of John Keeton to the defendant Casey.

The plaintiff, to sustain his action, produced his letters of administration and the order of the county court of Jefferson county and the let-

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ters of W. Keeton upon John Keeton's estate, and the inventory of said estate, in which the slave in controversy was included, he also proved the present possession of the defendant, the former possession of John Keeton and the value of the slave.

The defendant relied upon the record of the proceedings of a probate court in Tennessee termed a court of pleas and quarter sessions. This record showed, that Wm. Keeton had taken out letters of administration in Tennessee upon the estate of John Keeton, that he had inventoried as part of this estate some twenty slaves, brought from Missouri, and among them the slave in controversy, that an order of this probate court was made for the sale of these slaves, that they were sold, and that their sales were reported to this court, who approved of them, and finally had a final settlement with said Keeton.

Receipts were also produced on the part of the defendant from several, perhaps all, of the heirs of John Keeton, to the administrator Wm. Keeton for their respective shares of that estate, and proof was given touching their formal execution. In the depositions taken for this latter purpose, an attempt was made on the cross examination of the witnesses to establish fraudulent conduct on the part of Wm. Keeton in this whole transaction. This proof was not admitted.

The defendant also proved that sometime in 1830 or 31 Wm. Keeton, who had removed those 20 slaves from Missouri as part of the estate of John Keeton in 1827 or 28, brought back to this State several of them, and among them the slave Calvin, thus he from this time treated them as his own and finally sold Calvin to the defendant for about \$500.

A good deal of testimony, in the shape of depositions, was offered by the plaintiff to establish fraud on the part of W. Keeton in the management of the estate of John Keeton. This testimony was excluded.

The plaintiff also produced a record of the proceedings in the case of Lackey and others heirs of John Keeton vs. Wm. Keeton, Elizabeth Keeton and Bradford and Campbell, securities upon the Tennessee bond of W. Keeton. This was an appeal from the chancery court of Franklin county, Tennessee. to the supreme court of that State. A bill had been filed against W. Keeton, (who however was never served) against the widow of John Keeton, and Bradford and Campbell, securities of W. Keeton, to account for the estate of John Keeton alledged to have been fraudulently mismanaged by said Wm. Keeton. A decree in favor of the complainants was made by the chancellor, but the supreme court reversed the decree, so far as the slaves received from Missouri were concerned, holding that the securities of W. Keeton in Tennessee were

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not responsible for those slaves, as they were originally reported to the probate court of Missouri, as part of John Keeton's estate there, and there administered upon.

This record was excluded, and the plaintiff took a non-suit.

We are unable to perceive any principal of law upon which this suit can be maintained, assuming that the facts of the case have been fully presented. The defendant is a bona fide purchaser of the slave from Wm. Keeton, for a valuable consideration, and without notice of any fraud. All the proof therefore designed to establish fraud upon the part of Wm. Keeton in his administration of the estate of John Keeton, is entirely irrelevant, such proof cannot affect the defendant's title.

Moreover, the record of the probate court of Tennessee shows a regular administration of this estate, an inventory of this very slave, and an order for his sale by that court; an actual sale, and a subsequent ratification of it by the court upon a final settlement of the estate. There seems to be no question of the jurisdiction of the court of pleas and quarter sessions over this matter, and it certainly cannot affect the rights of the defendant, that errors were committed by the court, or frauds committed by the administrator. If the court committed errors, there was a tribunal to revise and correct them; if the administrator committed frauds, he and his securities were responsible. But to attempt to follow this property in the hands of a bona fide purchaser, not even a purchaser directly at the sale of the estate, but secondarily from the individual who had purchased at these sales, is not sanctioned by any legal rules in accordance with the principles of equity.

We scarcely think it material, whether the record of the decision of the supreme court of Tennessee in the case of Lackey and others vs. Bradford and Campbell had been read or not. That decision certainly has no binding force in our courts. The parties are not the same as those now before this court, and the decision itself is merely upon a question of law, only collaterally involved in this case; undoubtedly it is an authority to which, as far as it is supported by reason and good sense and established principles, the courts here may refer. But it is no more than the decision of any other respectable tribunal upon the same question. I cannot pass by this decision, however, without indicating my entire dissent from the principles decided, if I have rightly apprehended them as these principles seem to be the basis of several suits brought by the heirs of John Keeton in this State, two of which are now before us, and several others depending below, I think it not improper to intimate the views of this court here.

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The supreme court of Tennessee in this case of Lackey and others vs. Campbell and Bradford, refused to hold the securities in the bond given in that State by W. Keeton responsible for property received originally by Wm. Keeton, whilst administrator here but subsequently withdrawn by him from the jurisdiction of the probate court in this State, by the assent of that court, and reported to the probate court of Tennessee and there administered. After a learned disquisition upon the subject of domical and independant, primary and ancillary administrations, the court come to the conclusion that the Missouri administration was an independant one, and seems to place the irresponsibility of the Tennessee securities upon principles of international comity: They further declare that the securities in Tennessee ought not to be held responsible for this property administered upon in Missouri, because although passed over to the Tennessee administrator, it is not to be presumed that the securities ever contemplated a liability for a large amount of property, not within the jurisdiction of that State, and properly belonging to the primary or independant administration in Missouri. The question of domical and primary and ancillary administration I shall not examine, nor shall I undertake to question the propriety of the decision, so far as the Tennessee securities are concerned. This may be the law in Tennessee; we do not understand it to be the law here. A bond under our statute requires the administrator faithfully to administer the estate of the deceased, account for, pay and deliver all money and property of said estate and perform all other things touching said administration required by law. It is not necessary that all the property of the deceased should be included in the first inventory, and of course he is only responsible for such property as actually comes into his possession. But our law provides for different inventories, it contemplates the possibility or probability of portions of the estate scattered in different counties or States; and when this property does come into the hands of the administrator here; when he does report its reception to the probate court, from whatever quarter of the globe it is received, it forms a part of the assets of that estate, and as such the administrator and his securities are responsible for its faithful administration. It is not material to this question, whether the administration be primary or ancillary that is a question which becomes important in determining what disposition the court having jurisdiction will order of an estate; it is a question in which creditors may be interested, it is not perceived what bearing it has upon the responsibility of securities. No doubt, in the event of a large or unexpected accession to an estate from a foreign

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administration, the probate court may think it prudent to require additional security—or the securities themselves may require additional co-securities. All these steps are contemplated by our statute and provided for, both to secure the heirs and to protect the securities themselves.

As we have before observed, the supreme court of Tennessee have declared the securities of an administrator there not responsible for property administered on in another State, and subsequently passed over to the administration there. This is the law in Tennessee and with this we have nothing to do. It is sufficient that the courts of that State have so decided it, but when the court of that State further intimates, that the responsibility for such maladministration rests upon the securities here, that is another question to be determined by the courts of this State, when it arises.

The record of this case to the supreme court of Tennessee is then entitled to no weight here in this case. It was properly excluded by the court. Even the decision in Tennessee did not pretend that purchasers of this property, sold under the orders of their probate court, and fraudulently, it may be, were responsible to the heirs or an administrator *de bonis non*.

Judgment affirmed.

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1. In an action against a common carrier for a loss on freight occasioned by unnecessary delay and the unseaworthiness of the vessel; upon proof of such delay or unseaworthiness and a loss, the carrier can exempt himself from liability therefor, only by showing that such loss would and must have happened in the absence of such delay and unseaworthiness.
2. In an action against a common carrier for a loss on freight occasioned by delay of the vessel, if it be proved that the article freighted bore the same price, at the place of delivery, at the time it was delivered that it did at the time it ought to have been delivered: yet the owner of the article freighted is entitled as damage, to legal interest on the amount of money which would have arisen from the sale of the article at the time it should have been delivered to the time it was actually delivered.

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APPEAL FROM ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

This was an action of assumpsit, brought for the recovery of freight money.

At the trial below, the plaintiff showed that in November 1845, the appellant, Smith and Carter, shipped on the steamboat *Reveille*, of which plaintiff was the master, at the port of Galena, 2003 pigs of lead, weighing 138 343 pounds. The lead was consigned to Webster & Co. of St. Louis, to be delivered to them "unavoidable dangers of the river and fire only excepted"—at St. Louis, upon the payment of freight at the rate of seventy-five cents per 100 lbs. The bill of lading was in the usual form and bore date Nov. 15th, 1845. The plaintiff further proved that Webster & Co. received the lead early in February, 1846, from the steamboat *Fortune*; to which boat it had been re-shipped, in consequence of the grounding and loss of the *Reveille*. The partnership of Smith and Carter, and the fact that plaintiff was master of the *Reveille*, at the time of the shipment, were admitted.

Here the plaintiff rested.

The defendants then introduced evidence tending to show that the *Reveille* had no fit pilot for the trip and that after she was loaded, she waited a day or two at Galena for a pilot; that at that season such a delay might diminish her chance of arriving at St. Louis, before the close of navigation; that an extraordinarily high rate of freight was agreed upon, such as would not have been paid, unless the shipper expected that his lead would reach St. Louis before the close of navigation; that the *Reveille* finally started insufficiently officered and equipped, in that she had only one pilot, while running in a trade in which two are necessary, and this one not used to this navigation, and was not provided with good and sufficient anchors, spars, tackles and rigging; that the *Reveille* grounded on the lower rapids of the Mississippi river, where such anchors, spars and rigging are absolutely necessary; and that she might have got off if she had been so provided and perhaps prevented from grounding, that lead shipped by the steamboat *St. Croix*, which left Galena after the departure of the *Reveille*, arrived within thirty miles of St. Louis that fall, before the river closed; that had the lead arrived before the close of navigation, it could have been sold for from \$3.80 a \$4.00; that when it did arrive it was worth only \$2.50. In rebuttal, plaintiff gave evidence tending to show that the *Reveille* did not necessarily or improperly delay starting from Galena; that she was sufficiently provided with pilots and crew and sufficiently officered, and equipped and provided with all necessary anchors, spars, tackles and rigging, and that it was not from the want of any of these things or from carelessness or negligence or incompetency on the part of those conducting her, that she got aground, or that the delivery of the lead in St. Louis was delayed. that there was no unnecessary or avoidable delay on the voyage, or in the delivery of the lead.—The plaintiff proved that the river closed that fall very suddenly, by freezing, about the 20th of November, when this lead was at or near the foot of the lower rapids, that the lead was finally delivered to the consignees among the first lots that were delivered in St. Louis, after the re-opening of navigation between the lower rapids and St. Louis and long before the re-opening of navigation to Galena that season, the plaintiff also proved that the price of lead is higher in St. Louis in winter and spring, before the opening of navigation to Galena, than after. The plaintiff also introduced evidence tending to show that the price of lead in St. Louis in the month of February, 1846, after the lead in question arrived there, was as high or higher than it had been in the last half of the previous November, when the lead would have arrived had there been no extraordinary detention. Among the actual sales it was proven that one was made in February, 1846, at \$4.12½ of a lot of lead that had been stopped at the foot of the lower rapids by the closing of the river in the fall. The sale was made before the lead actually arrived but in anticipation of its arrival before the opening of navigation to Galena, which it did and among the first lots. Quite a number of actual sales were shown; and but one offer.

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This was all the evidence.

At the request of the plaintiff, the court gave the following instructions to wit:

2d. "If the jury find from the evidence, that the price of lead in St. Louis, in the month of February, 1846, after the lead in question arrived here, was as high as it had been in the last half of the November previous, the defendants will not be entitled to have any thing allowed them in this case, as damages for not delivering said lead in November."

3d. "The best evidence of the price is actual sales and therefore in arriving at the price, the jury will be governed by actual sales, and not by mere offers made by one person to another."

Also on its own motion, the court gave the following instructions, to-wit:

4th. "If the jury should believe, from the evidence, that the delay in delivering the freight was occasioned by the negligence of the plaintiff, and that thereby the defendant was damaged, the jury will deduct the amount of such damages from the plaintiff's bill."

5th. "The measure of such damage, in case the jury shall find that the plaintiff is chargeable with it, will be the difference in the value of the lead at the time it would probably have come to hand by careful and skilful management, and the value of it, when it actually reached St. Louis."

6th. "Whether the plaintiff was guilty of such negligence as to charge him with those damages, is for the jury to determine, by considering the manner in which the vessel was managed, after the freight was put on board. If the vessel was run aground in consequence of the incompetency of the pilot employed; or if it was not got off because it was not suitably equipped, he is liable for the damages thereby occasioned to the defendant. But if the vessel got on the rocks, whilst having a skillful pilot, and could not be got off after suitable appliances and efforts were used, the plaintiff is not chargeable, although the jury shall find that the vessel was not provided at other times with competent pilots, or sufficient equipments."

1. If the jury shall find, from the evidence, that the material delay was caused by the fact, that the boat got aground at the rapids, it is unimportant whether there was unnecessary delay in starting from Galena, or in reaching the rapids, unless they shall believe from the evidence, that these previous delays contributed to produce that which happened at the rapids."

To the instructions marked "2, 3, 6 and 1," the defendants duly excepted.

At the instance of the defendants, the court gave the following instructions, to-wit:

7th. "If they believe from the evidence, that the boat, after she was loaded, was delayed at Galena for a pilot, or that she started down without enough or proper pilots, or that she was materially deficient in the usual and needful equipments of boats in that trade, for getting through the difficulties of that navigation, and that these, or any of these things contributed towards preventing the delivery of the lead that fell, they should allow the defendants such damages as, from the evidence, they believe the defendants to have suffered by reason thereof."

But the court refused to give the following, to wit:

8th. "A sale of lead to arrive does not give the market price at the time of sale."

To which decision the defendants duly excepted

The verdict was for the plaintiff.

The defendants filed a motion for a new trial for these reasons, to wit: 1st. Because the court gave the jury erroneous instructions. 2nd. Because the court refused to give the instructions asked. 3d. Because the verdict is against law, under the evidence.

The court refused said motion, to which decision the defendants duly excepted and appealed from trial and judgment of said court, to this court.

TODD & KRUM for appellants.

1st. The court below erred in giving the instructions marked six & one, because they assume that an unnecessary or negligent delay or the unseaworthiness of the vessel will not make the

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carrier liable for a loss, unless the loser prove, that such loss was caused by such delay or unseaworthiness; whereas the appellants insist the law under the most favorable view for the carriers, to be, that upon showing such delay or unseaworthiness and a loss, the carrier can exempt himself from liability therefor only by showing that such loss *would* and *must* have happened in the absence of such delay and unseaworthiness. Even this defence is a relaxation of the law, and not yet universally allowed. 11 Mo. Rep. 299; 6 Bingham 716, 12 Mo. Rep. 272 10 Mo. Rep. 6; 4 Binney 127; Story on Bailments 413 d.

The loss or injury is sufficient proof of negligence or misconduct or of the intervention of human agency, and that (the loss or injury) proved the "*onus probandi*," is at once upon the carrier to exempt himself from liability by showing not only that it was produced by a cause which either under the general law or his special contract with the loser, would *per se* exempt him, but also that it must and would have happened in any and all events.

See authorities above cited; also Story on Bail. sec. 528, 529, 574; Angell's law of Carriers sec. 472, 202; 7 Yerg 343, 3 Story C. C. Rep. p. 349.

2nd. The court erred in giving instructions marked 2, for if the supposition of the instructions were true, still the appellants would be damnified by losing the use of their money from November to February. In this case quite a large sum. 8 J. R. 213 decides that this damage is proper to allow in case the loser makes out a case for damages or indemnity. By this instruction the court assumes as true a matter for the province of a jury solely, to wit: whether appellants suffered, although prices were equal in November and February, as they must have done, as shown above. So that by reason of this instruction, and the giving of the one marked 3 and the refusing to give the one marked 8, the jury might have found the appellee guilty, and yet allow him no damages, by also finding that the price in February, was as good as in November.

3rd. By giving the instruction marked 3, and refusing to give that marked 8, the court obliged the jury to adopt an erroneous rule for ascertaining price or market value.

In a sale of lead to arrive the price agreed upon is necessarily founded upon a speculative judgment of what lead may be worth at the time of its arrival; in some cases it would be larger, in others smaller than the present price. From its nature, such sales are no evidence of the present price, and for this reason also, the court erred in giving instruction marked 3, because there was no evidence of an actual sale of *present* lead in February. When the lead did arrive, but only of one sale to arrive given on the part of the appellee, and of offers to sell given on part of appellants.

GEYER & DAYTON for appellee.

1st. The facts, as alleged by the appellants, and to which only the instructions refer, constitute if true, no defence to the claim for freight. The appellees right to freight was fixed by the delivery and acceptance of the lead; and the appellants were not entitled to set off, against it; damages, if they had sustained any, by reason of the lead not having been delivered as early as it should have been under the contract; such damages could only be recovered in a separate action. 1 Eng. Com. law Rep. 308; 4 Campbell Rep. 119; 5 Bosanquet & Pullen 135.

We are not aware of any cases in which such defence was allowed, except those found in the Pennsylvania Reports, and based expressly upon the peculiar statute of that State.

If the above proposition be correct, the judgment was of course for the right party, and for that reason ought to be sustained. Maston vs. Fanning, 9 Mo. Rep. 305; In matter of Pratte & Cabanne 12 Mo. 194.

If instruction No. 1, standing alone would be obnoxious to objections (which we utterly deny) it is unexceptionable when taken in connection with the others. Hart vs. Allen, 2nd Watts Rep. 114.

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Instruction No. 6, relates to the competency of the pilots, and the suitability and sufficiency of the equipments of the boat.

The appellants contended that the pilots were incompetent, by reason whereof the boat was run aground, and that for want of suitable equipments, she was not and could not be got off. This instruction tells the jury, that if they so find, the appellee is liable for any consequent damages, but if the boat got on the rocks, whilst having a skilful pilot, and could not be got off, although suitable appliances and efforts were used, the appellee is not chargeable, although the jury should find that the boat was not provided at other times with competent pilots and sufficient equipments.

The instruction should be carefully considered with reference to the facts of the case, the boat got aground only at the lower rapids, and there unavailing efforts were made to get her off. If the incompetency of the pilots occasion the former result, or the want of equipments the latter, the instruction declares the appellee responsible for the consequences. Thus, far there seems to be no exception to the instruction, but it goes on to declare, that if the boat grounded, while having a skilful pilot, and could not be got off with suitable appliances and efforts, the appellee is not responsible, although the boat at other times was not provided with competent pilots or sufficient equipments. It is the latter part of the instruction, which is excepted to.

There was not a particle of evidence showing or even tending to show, that the grounding at the rapids, or the failure to get off, was or could have been occasioned, or in the remotest degree effected, by any incompetency of the pilot, or insufficiency of the equipments up to the time of the arrival at the rapids, but the contrary was clearly shown. The pilot and equipments up to said arrival were sufficient for the navigation to the rapids. No accident happened up to that point, and no occasion occurred for any equipments not on hand. The real controversy was as to the sufficiency of pilots and equipments at the rapids. Some equipments necessary in passing through the rapids, were not essential in any other part of the navigation. (Davidson's testimony, see page 29 to 32 of record,) shows also, that it was customary to have, in passing the rapids, other pilots, than those who managed the boat in other places, and who could manage it perfectly well in other places. Persons resided at the rapids, and made it their business to pilot boats through them.

It is by no means clear, that the instruction was intended or understood at the trial to assert any thing stronger on this point, than that though the pilot in charge till the arrival at the rapids was not competent, or the equipments on board up to that time were not sufficient for the navigation of the rapids, still that mattered not if the deficiencies were supplied at the time of the accident.

The effect of any delay in getting to the rapids, consequent upon waiting at Galena for a pilot, and of the incompetency of the acting pilot, and of every other alleged fault of the appellee is declared and explained by the other instructions, Nos. 1, 4, 7. Every thing, which it can be pretended, that any or all of these things, if they existed, effected up to the arrival at the rapids, was delay in getting there, and the other instructions say, that if such delay or other faults, contributed to prevent the delivery of the lead, the appellee was responsible for the consequences. Instruction No. 6, was not designed to affect the question of delay; but to relate to other matters. It at most, only says that incompetency of pilots and insufficiency of equipments at other places, ought not to be regarded as getting or keeping the boat aground at the rapids, provided pilots and equipments were sufficient there. The instruction relates to the grounding at the rapids, and not to any previous delay, which brought the grounding so late that the lead could not be got off and forwarded.

Appellants instruction No. 7, and the court's instructions Nos. 1 and 4, would prevent the jury being misled by No. 6, if indeed there were any thing in the latter calculated to mislead them. *Chouteau and others vs. Uhrig et al.* 10 Mo. Rep. 62.

3d. We come now to consider the instructions relating to the measure of damages. Those bearing upon this question are numbered 2, 3, 4, 5, 7 & 8. These also will be better understood by considering them in a different order from that of the record.

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No. 7, asked by the appellants directs the jury upon the contingencies specified to allow the appellants such damages, as they believed the appellants suffered by reason of the delay in delivering the lead.

No. 4, given by the court upon its own motion, is to the same effect.

No. 5, also given by the court upon its own, and not excepted to, instructs the jury that in case they find the appellee chargeable with damages, the measure will be the difference in the value of the lead at the time it would probably have come to hand by careful and skilful management; and the value of it when it actually reached St. Louis.

The correctness of the foregoing three instructions, cannot now be questioned by the appellants.

No. 2, given at the request of the appellee, and accepted to by the appellants, instructs the jury, that if they believe from the evidence, that the price of lead in St. Louis, in the month of February 1846, after the lead in question arrived here, was as high as it had been during the last half of the November previous, the appellants will not be entitled to have any thing allowed them as damages for not delivering said lead in November.

In this connection it should be borne in mind, that had there been no detention, the lead would have reached St. Louis in the latter part, about the 20th of November 1845, and that in point of fact, it did not arrive then and was delivered on the 3d of February, 1846.

In respect to the instructions relative to the mode of ascertaining the value of the lead, we contend that the court committed no error.

No. 3, given at the request of the appellee, asserts that the best evidence of the price is actual sales, and directs the jury to be governed by such sales, instead of mere offers, made by one person to another.

The appellants resorted to actual sales to show the price in November, as they also did to show it in the spring. (See testimony of Webster and Morrison.) An offer may be evidence, that the market price is as *high*, though not the best evidence that it is as *low*, as the offer. Actual sales are certainly better evidence of the market price.

We contend therefore, that it is clear that under the evidence in the case, instruction No. 3, was properly given.

Instruction No. 8, was properly refused. It was particularly aimed at the sale spoken of by the witness, Morrison, made at the early part of February 1846, at \$4 12½ 100, of lead not then arrived, but which had been frozen up at the foot of the lower rapids, and was expected to arrive before the opening of navigation to Galena. The same witness states and every body knows that lead in St. Louis is higher before the opening of navigation to Galena, than after, when communication is opened with the whole lead region, and the accumulated supply of winter is thrown into market. The price diminishes as the opening of navigation approaches.

In February, then, lead not arrived, would not command a higher, if as high a price, as lead actually here. The probability of detention till the opening of navigation would tend to diminish the price. If the sale in question did not give the market price at the time, it certainly gave no *higher* price. The refusal of the instruction, therefore, could not harm the appellants.

The court does not say that that particular sale did give the market price, and to have said expressly that it did not, could not have conduced to the fair and proper decision of the case.

The instruction, as asked, could only have benefitted the appellants, by misleading the jury, and was, therefore, properly refused.

RYLAND, Judge, delivered the opinion of the court.

The questions arising on this statement of case, present the propri-

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ety of the instructions given, as well as of those refused by the court below.

The appellants contend that the court erred in giving the instructions marked 6 and 1 as well as those marked 2 and 3 in the above statement. They contend, that by the instructions 6 and 1 as above set forth, the court assumed the law to be, that "an unnecessary or negligent delay, or the unseaworthiness of the vessel, will not make the carrier liable for a loss, unless the loser prove that such a loss was caused by such delay or unseaworthiness." Whereas, they insist the law under the most favorable view for the carrier, to be, that upon showing such delay or unseaworthiness and a loss, the carrier can exempt himself from liability therefor, only by showing that such loss would, and must have happened in the absence of such delay and unseaworthiness. Even this defence is a relaxation of the law, and not yet universally allowed. 11 Mo. Rep. 299; 6 Bingham 716; 12 Mo. Rep. 272; 10 Mo. Rep. 6; 4 Binney 127; Story on bailments, 413. I am not satisfied with these instructions numbered 6 and 1. They are not warranted by the authorities; and the appellants view is the correct one; and the authorities support them in that view.

This court has adopted the view above taken by appellants. If this was the only error committed by the court below, after having given the 7th instruction alone for defendants, I might be inclined not to interfere. That instruction is in these words: "If the jury believe from the evidence, that the boat after she was loaded, was delayed at Galena for a pilot, or that she started down without enough or proper pilots, or that she was materially deficient in the usual and needful equipments of boats in that trade, for getting through the difficulties of that navigation, and that these or any of these things contributed towards preventing the delivery of the lead that fall, they should allow the defendants such damages as from the evidence, they believe the defendants to have suffered by reason thereof." This instruction was calculated to bring all the testimony of the neglect or delay, or deficiency in equipments, and the consequences of such, if there were any, before the jury, and might have done away with the improper effect on the jury of the other instructions numbered 6 and 1, and I might be indisposed to disturb the verdict had these been the only instructions.

But the instruction marked number 2, is so clearly incorrect, that this case must be reversed and sent back, and therefore, I have noticed the illegality of the 6th and 1st instructions, to prevent such on the future trial hereof.

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By the 2nd. instruction, the jury are deprived of the power to give to the defendants, interest for the amount, of the money, which would have arisen from the sale of the lead in November, provided the lead would have sold in February, as high as it could have been sold in November. That is, the court told the jury, "that if they found from the evidence, that the price of lead in St. Louis, in the month of February, 1846, after the lead in question had arrived there, was as high as it had been in the last half of the month of November, previous, the defendants will not be entitled to have anything allowed them in this case as damages, for not delivering said lead in November." No matter therefore, how careless or negligent, so ever, the carrier may have managed this business, if the lead was at length delivered, and at the time of delivery it was selling in market for as high a price as it had been selling at, during the period in which it by common care and diligence could have been delivered; yet for the use of this money for months, nothing is to be allowed. I am satisfied this must have escaped the attention of the court below. The damages sustained by the defendants therefore, in this case, although the lead was selling at the time it was delivered in February, as high as it had sold at in November, when it was in all probability to be delivered would be the interest for the time, upon the amount of such sales at least. The want of this money for two or three or more months, may have been a serious matter with the defendants as merchants; they should at least have lawful interest counted in as part of the damages. This point has been already decided by this court. I am not disposed to complain of the 3rd instruction, yet there may be cases when such sales would not be the best evidence of the value or price of commodity. In every case, the court should look at the nature of the evidence offered to prove price or value, and give to the jury such instructions as may best lead them to a proper conclusion. The actual sales in this case may have been the best criterion to ascertain value, and therefore, I will not condemn that instruction. The 8th instruction is in these words: "A sale of lead to arrive, does not give the market price, at the time of the sale."

This proposition I imagine would hardly be controverted. Such sales are, on one's own peculiar judgment. A speculator or close watching, sharp sighted observer of the past and the present might form an estimate for the future; and prepare for consequences by buying on future delivery; such sales are not the best evidence of the market price of the commodity thus sold. This instruction therefore, should have been given.

I am, therefore, of the opinion that the court below erred in giving the

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instructions numbered 6, 2 and 1, and in refusing to give the one numbered 8. The 5th instruction was not excepted to by defendants, but it is incorrect, notwithstanding, as it does not lay down a proper criterion, by which the jury are to estimate the damages. For these reasons therefore, it is my opinion that the judgment below ought to be reversed—that a new trial ought to be granted.

This cause is, therefore, remanded with directions to the court below to allow the defendant's motion for a new trial, and to proceed to hear and determine this cause in accordance with the views entertained by this court, and set forth in this opinion.

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1. The "delivery of a deed by the grantor, for the purpose of having it recorded, may, under proper concurring circumstances, be regarded as a delivery to the grantee."
2. Circuit courts have a discretion in the admission of evidence after a cause has been once closed, and the supreme court will not interfere with the exercise of it except when used oppressively.
3. The fact that the attorney of the plaintiff submitted to a non suit, under a misapprehension of the purport and meaning of an instruction given by the court is not good cause for setting it aside.
4. A debtor executed and delivered for record a deed of trust conveying certain property to pay a specified debt. On the same day that the deed was executed, the sheriff, by virtue of an attachment, took possession of the property. Held, that in a controversy between the attaching creditor and the trustee, there being no evidence upon the point, the possession of the sheriff is *prima facie* evidence that he seized the property at an earlier hour of the day than the deed of trust was delivered for record; and that it devolves upon the trustee to show a precedent right.

ERROR TO ST. LOUIS COURT OF COMMON PLEAS.

STATEMENT OF THE CASE.

The defendants in error sued out an attachment at the February term, 1849, of the court of common pleas, against Aug. J. Ambler and Alfred A. Heath, partners under the name of Ambler & Heath, dealing in liquors, groceries, &c., on the alleged ground that the defendants

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in the attachment had made a fraudulent assignment of their property, &c., so as to hinder and delay their creditors, &c. All the property in question, which consisted mainly of liquors, &c., was seized under the attachment, on the 13th January, 1849, (the day on which the writ was issued) as the property of the defendants. At the return term, Ambler & Heath filed their plea in the nature of a plea in abatement to dissolve the attachment, and the issue upon this plea was found against Ambler & Heath.

At the same term of the court of common pleas, Pearce, the plaintiff in error, filed his interpleader, claiming the property taken by the officer under attachment. On the trial of this issue, Pearce, the claimant, to wit: on the 24th March, 1849, offered in evidence before the jury a note made by Ambler & Heath to Irel Ambler, dated January 11th, 1849, for \$4,462 32, payable one day after date; also a deed of trust made by Alfred A. Heath and Augustine J. Ambler (the defendants in the attachment) to said Pearce, the deed of trust bears date January 13th, 1849, and is executed, "Ambler & Heath, [SEAL] Alfred A. Heath, [SEAL] Augustine J. Ambler, [SEAL] by his attorney Alfred A. Heath." This deed of trust was made and recorded January 12th, 1849, and purported to convey to David Pearce, the interpleader, all the property in question, in trust to secure the payment of the note made by Ambler & Heath for \$4,462 32 to Irel Ambler before mentioned. The claimant also read in evidence a power of attorney purporting to be executed by Augustine J. Ambler (one of the defendants in the attachment) to A. H. Heath, the other defendant, which power bears date of January 13th, 1849, (the same day the attachment was sued out and executed on the property. The power authorized Heath to settle up the business of the firm of Ambler & Heath, and to collect all monies due said firm, &c., and to transact all business, &c., by any manner of means whatsoever according to law and to the best of his judgment, &c., to sign my name and affix my seal to all documents which it may be and appear necessary to draw, &c., the power of attorney also expressly ratified and confirmed the making of the deed of trust above mentioned.

Charles Gibson, attorney for claimant, testified that the power of attorney was handed to him on 13th January, 1849, the day the attachment was levied. Witness was practising law, and acted as the legal adviser of Ambler & Heath, and had been their legal advisers since the spring of 1848. Witness instructed Heath to put the amount, viz., \$4,462 32 into a note, and he (witness) would draw a deed of trust, which he did, and it was signed by Heath as above on the 12th January, 1849, about noon, and immediately put on record. Late in the evening of January 12th, witness found a note on his table signed A. J. Ambler, confirming the deed of trust, as follows: Mr. C. Gibson—Sir: I hereby acknowledge and confirm the deed of trust made by Alfred A. Heath, as attorney for me in favor of Irel Ambler to a certain stock of goods, late the property of Ambler & Heath of this city, and hold myself amenable for the faithful discharge of the provisions thereof.

A. J. AMBLER.

St. Louis, January 12th, 1849.

Witness had never seen Irel Ambler, the payer of the note, nor did the witness know that A. J. Ambler had ever seen the deed of trust, when he handed witness the power of attorney on the 13th of January. The claimant then proved that some time in September, previous to the attachment, Ambler & Heath sold to Page & Bacon, several drafts in favor of Irel Ambler and endorsed by him, and Ambler & Heath amounting to \$6,000. Here the claimant rested.

On the part of the attaching creditors it was proved that Irel Ambler resides, and has resided for a number of years in the State of Connecticut. That he is the father of A. J. Ambler, who is brother-in-law to Heath. That Pearce the interpleader lives in St. Louis, but was absent on a visit to the eastern cities when the note and deed of trust were made, and the attachment sued out. Barrel, a clerk in the store of Ambler & Heath, testified that he was in the store, during the whole of the 12th of January, 1849, and that there was no delivery to Pearce or to any one for him of any of the property specified in the deed of trust—witness did not know

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of any indebtedness of Ambler & Heath to Irel Ambler, and had never seen or heard of the note for \$4,462 32, until after the attachment was sued out—witness produced two letters addressed to him by A. J. Ambler one of the defendants, one dated Dec. 28th, 1849, and the other Jan. 6th, 1849, written, one at Louisville, Ky., and the other at Cairo, Ill., and which letters were received by witness the one on—day of January—, and the last the 11th Jan. 1849, both letters directed witness to put up liquors, &c., &c., out of the store of Ambler & Heath to the amount of \$3,000 and ship them down to Cairo, consigned to White & Co., and where Ambler would receive them. Witness did not comply with the directions contained in these letters for the reason that the entire stock in the store did not amount to more than one-third of the amount witness was directed to put up and ship, and besides witness had no faith in the person to whom the liquors were to be shipped—witness also testified that on the evening that A. J. Ambler returned to St. Louis, which was Jan. 12th, 1849, he asked witness, *"do you think we must go by the board?"* witness answered, *"yes, White's acceptance caused it, not our business."* Ambler then said, *"If we must go, we must—make the most of it."* He then proposed to ship the goods to New Orleans, sell them and with the proceeds go to California. Heath was then in St. Louis. E. R. James, book-keeper of Ambler & Heath testified that Irel Ambler was charged with several amounts, debits, on the books of Ambler & Heath, but had no credits on their books. That the amount of debits on the books of Ambler & Heath was several hundred dollars. It was proved also, that neither Pearce, the claimant, nor Irel Ambler were present when said note and deed of trust were made and knew nothing of the note and deed of trust at the time the attachment was levied. That Pearce was in Connecticut at the time the note was sent on then to Irel Ambler, where it was endorsed by him, and brought out by Pearce, who arrived in St. Louis with the note a few days before the trial of this case.

The attaching creditors then rested.

In rebuttal the claimant called A. A. Heath, (one of the defendants in the attachment) as a witness, who was objected to on the ground of interest, but the objection was overruled and exceptions taken. Heath testified that the indebtedness of Ambler and Heath to Irel Ambler first, was \$6000, which was reduced to \$4462 32-100, which was the balance due him for money advanced to Aug. J. Ambler to enable A. & H. to go into business, that he the witness as attorney for Irel Ambler, made the advance. That prior up to the time of making the deed of trust, Irel Ambler held several notes against A. J. Ambler for the advance above mentioned; but that the note for \$4462 32-100, was designed to include all of those prior notes. That the several notes of A. J. Ambler to Irel Ambler were held by witness as attorney for the latter, up to the 12th January 1849, when they were assumed by Ambler & Heath, by witness making the note for \$4462 32-100, and the small notes given up, that witness had no power of attorney or authority from A. J. Ambler to sign the deed of trust at the time he signed it, that A. J. Ambler returned to St. Louis on the 12th January 1849, in the evening after the deed of trust was made, that no instructions were given the clerks in the store, not to sell any of the goods, but had any been sold after the deed of trust was made, it would have been accounted for to the trustee. That soon after attachment was levied witness wrote to Irel Ambler, informing him of the note and deed of trust. This substantially was all the evidence in the cause, and both parties rested.

The court then gave to the jury the following instructions:

"That if the deed of trust was not delivered to the trustee until after the attachment was levied, then it passes no title as against the attaching creditors."

To the giving of which instruction, the claimant at the time excepted.

The counsel for claimant then offered to prove that the deed of trust was delivered to Charles Gibson on the 12th January 1849 the day it was executed, and that Gibson accepted it as Pearce's agent, and put it on record, and that Pearce, when apprised of the deed, which was long after the attachment was levied, ratified Gibson's acts, and accepted the trust; but it was at the same time admitted that Gibson at the same time the deed was delivered to him,

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had no authority from Pearce to do any thing in the premises, and had never acted as his agent or attorney, and that he, the said Gibson, had acted in this matter as attorney for Heath or Ambler & Heath. To the giving of the evidence, thus offered the attaching creditors objected, and the court sustained the objection, and refused to allow the testimony thus offered to be given to the jury, and to the ruling of the court in excluding the evidence thus offered, the claimant at the time excepted.

Thereupon the claimant voluntarily submitted to a non-suit, and judgment was rendered accordingly, afterwards and within the time prescribed by the rules and practice of the court of common pleas, to wit: on 26th March 1849, the claimant filed his motion and reasons to set aside said non-suit, as follows:

1st. Because the instruction given by the court, was against law.

2nd. Recause the court improperly excluded evidence offered by interpleader to establish the delivery of the deed.

Because the acting attorney, Gibson, was mistaken in the purport and meaning of the instruction given by the court, and would not have taken said non-suit, if he had properly understood the instruction given by the court.

While said motion was pending, and undetermined in said court, the claimant, at the same time to wit: on the 27th March 1849, filed a second interpleader claiming as his own all the property levied upon under the attachment. Afterwards and on the same day, the motion of said claimant to set aside said non-suit was overruled and exception taken in due and proper form, and the case comes into this court by writ of error, and to reverse the judgment of the court below, the following errors are assigned:

1st. That the court below erred in overruling the motion made by interpleader to set aside the non-suit.

2nd. Because the court erred in giving the instruction, it gave.

3rd. Because the court below erred in excluding the evidence offered by interpleader.

It is agreed that in the argument and hearing of this cause in the supreme court, wherein David Pearce, the above interpleader, is plaintiff in error and said James Dansforth, and Son defendants in error, that the reports of the testimony as well as other original papers used in the trial below, shall be considered as a part of the record in the supreme court, in every particular, as if said reports of testimony and original papers were set out in the record.

TODD & KRUH for defendants.

Two questions are presented in this record for the decision of the court:

First, Was the instruction given to the jury in the court below, erroneous, and

Secondly, Was there error in the refusal of the court below, to allow the plaintiff in error to give *fur her* evidence, after both parties had closed and the court had instructed the jury?

The defendants in error, in support of the judgment below, make the following points, and cite authorities, &c.

1st. The instruction to the jury by the court below is but a simple examination of a sound rule of law, and one that is applicable to the facts in the case.

The deed of *trust* on its face, purports to have been made on the same day that the attachment was sued out and levied, hence it became necessary on the part of claimant to offer evidence, (as was done) to show that the deed was *bona fide* and made and recorded before the attachment was levied, otherwise he would have shown no right to the property in question, superior to the attachment.

2nd. Delivery was essential to the validity of the deed in question. Delivery *ex vi termini* imports that there must be a recipient.

It would be absurd to hold that a thing was delivered, when there was no person to receive. 6 Mo. Rep. 326; 12 J. R. 413; 2 Wend. 308; 1 J. Cases 114; 5 id. 532; 6 Cow. 617; 4 Vira ab. 27, sec. 52, 12 id. 105; 1 Shep. Touch 57, 58; 2 Bl. Com. 307.

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3rd. The deed in question neither proved nor tended to prove the claimants right to the property in question.

1st. Because Heath, who made the deed, had no authority to sign for Ambler, and his subsequent ratification, (whether *bona fide* or with a view to defeat the attachment,) adds nothing to the validity of the deed as between the parties to this suit.

2nd. Because the debt specified in the deed was not a partnership debt of Ambler and Heath, the latter had no authority to assume it and make a partnership debt, nor had he any authority to convey in trust to secure that debt, the entire stock and property of the co-partnership of Ambler & Heath.

3rd. Because there was no delivery of any of the property in question to the claimant, or to any one for him, and the delivery of the deed to Gibson was a nullity.

4th. Because there was no proof of a sufficient consideration to support the deed, and such proof was essential to give it effect. Call on Part. 217; Story on Part. 144 note; 5 Mo. Rep. 466; 1 Dessan 537; 5 Page 30.

5th. Because the deed was voluntary by Ambler & Heath, who at the time were insolvent. The deed is therefore void against creditors. 9 Mo. Rep. 606.

It was in the direction of the court below, whether to permit the claimant to give further testimony or not, (both parties having closed and the court having instructed the jury before the offer to give further testimony was made) and this court will not undertake to control or revise that discretion.

The debt to secure which this deed of trust was made, was in fact as shown by the evidence the individual debt of A. J. Ambler and not the debt of Ambler and Heath, therefore the claim of the interpleader cannot have precedence over the claim of the attaching creditors; theirs being for a partnership debt of Ambler and Heath.

The plaintiff in error having submitted to a non-suit voluntarily, and inasmuch as it is apparent from the record, that the evidence offered by claimant and excluded by the court, neither proves nor tends to prove the claimants right to the property in question, (the same evidence substantially having already been submitted to the jury) the court below properly refused to set aside the non-suit, and this court will not reverse the judgment on that ground.

Judge BIRCH delivered the opinion of the court.

It having been decided at the present term, in the case of Mayor vs. Hill and others, that delivery of a deed by the grantor, for the purpose of having it recorded, may, under proper concurring circumstances, be regarded as a delivery to the grantor, or trustee, there seems nothing in the instructions of the court upon that point which might not at all events have been rendered plain and pertinent to the supposed purposes of the plaintiff, had he asked a short explanatory instruction. The judgment cannot therefore be disturb upon that ground.

As it is a matter of discretion with the inferior courts, to admit or exclude testimony when offered after a case has been once closed, many reasons suggest themselves why the exercise of that discretion should be respected, even beyond what may be apparent from a mere reference to the record. Without, therefore, intending to intimate that cases may not arise, in which the abuse of such a discretion may be too apparent

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to be overlooked, we forbear any further review of the question which has been raised upon that point in the present case, than to add that if it were exercised injudiciously, or oppressively, it has not been pointed out. The same remarks are applicable to the second interplea, and the matter concerning the misconception of the attorney we apprehend is scarcely relied upon. To entertain such reasons as a ground for opening up a case anew, would be to give to trials a multiplication so indefinite, as to render them expensive and oppressive farces, instead of sober realities for the adjustment and enforcement of civil rights.

Without deeming it necessary, therefore, to re-state the doctrine applicable to other points which have been raised in this case, it seems to us sufficient that (at least inferentially) the attachment was not only issued, but the property in question was in the hands of the sheriff at an earlier hour on the 13th of January than the deed of trust was delivered for record. At least, the plaintiff had an opportunity, under the instructions of the court, to have had that question settled according to the belief of the jury—the appropriate triers of such a fact—but he seems to have waived it, leaving the inference of the law in favor of the possession of the sheriff, as above intimated.

It is not for us to determine under the aspect in which this case is presented, whether the date of the deed or the date of recording shall prevail. It is deemed sufficient for us to decide, that in order to divest the rights which *prima facie* resulted from the possession of the attaching creditors, it was necessary to establish an unambiguous and unsuspected *precedent* right, failing to do which, by leaving it to a jury to determine, the property necessarily remained under the legal custody which had previously attached to it. The judgment of the court of common pleas is therefore affirmed.

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By the act of 1825 regulating conveyances, a quit claim deed is not sufficient to transfer to the grantee the legal title subsequently acquired by the grantor. But where the grantor

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makes a deed purporting to convey a fee simple *absolute*—that is an *indefeasible estate*, and at the time has *no title* whatever either legal or equitable, a subsequently acquired legal title by the grantor will by operation of the act pass to the grantee.

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GEYER for plaintiff in error.

I. Whether it devolved on the defendant to prove that Pierre Chouteau, at the date of his deed to Strother, had no interest in the tract of land first described in that deed, or had previously sold and conveyed away all his interest therein, or the fact is assumed, and the burthen thrown on the defendant to disprove it, the deeds executed by Pierre Chouteau were before the jury, and the question submitted involved matters of law, which it was the province of the court and not of the jury to decide.

1st. In order to ascertain whether Chouteau had any interest in the land mentioned, it was necessary, first to determine the extent and legal effect of the confirmation as well as the location and boundaries, which are not fixed by the official survey. *Ott vs. Soulard*, 9 Mo. 581.

2nd. With reference to the question whether Chouteau has conveyed away all the land within the first tract described in the deed to Strother, it was necessary to determine the extent, legal effect and boundaries of these deeds—presenting mixed questions of law and fact.

The existence of a deed, is a fact for the jury; but its legal effect and operation, a question of law for the court. *Jackson vs. Porter*, 1 Paine 457.

What are the boundaries in a deed, is a question of law, the place of boundary, a question of fact. *Doe vs. Paine*, 4 Hawks 64; *Cockerell vs. McQuinn*, 4 Monroe 63; *Hurley vs. Morgan*, 1 Der. & Bal. 425; *Hodges vs. Strong*, 10 Vt. 247.

No principle is more clearly settled than that the construction of written evidence is exclusively with the court. *Levy vs. Gadsby*, 3 Cran. 180. And when extraneous evidence is admissible to aid the construction, the court is to decide the effect of such evidence, and what shall be the construction of certain facts as are proved. *Ferole & Bigelow*, 10 Mass. 379, 384.

It is error for a court to leave matters of law to a jury. *Work vs. McClay*, 2 Serg't. & R. 415; *Coleman vs. Roberts*, 1 Mo. Rep. 297; or to refer to them the construction of written instruments. *Walsh vs. Deeser*, 2 Binney 337; *Reeve vs. Leonard*, 1 Mass. 91; or to give an instruction which involves a question of law. *Fugale et. al. vs. Carter*, 6 Mo. R. 267; *Newman vs. Lawless*, ib. 279; or to refer to the jury a mixed question of law and fact. *Plater vs. Scott*, 6 Gill and J. 116; *McRea vs. Scott & Rand* 463.

Deeds are to be construed formally and as near the intent of the parties as possibly consistently with the rules of law. It is only where the intention is overruled by the law, that the intention will not be carried into effect. It is to be construed altogether and not by single clauses, and the whole shall have effect if possible—if not, a prior clause will be sustained in preference to a subsequent one—but the rule rejecting any clause is merely technical, and not to be acted upon when it can be avoided. Doubtful words are to be construed most strongly against the grantor—but regard must be had always to the intent of the parties collected from the whole context of the instrument—words are not to be added or excluded, or a meaning given them contrary to the common understanding. No violent or forced construction ought to be made beyond the ordinary and fair meaning of the words employed, either to support or invalidate any instrument, but when words are repugnant to other parts of the deed and the general intent, will be rejected, and when they are mutually repugnant, the intent will prevail. 2 Hilliard on real property 322-3-4; Broome's legal maxims, 237-8, 249, 251, 254, 257.

Applying these well settled rules to the deed in question, it cannot be held that the tract of land first described and purported to be conveyed is bounded on the west by the common field lots. The first clause of description is, "a tract or parcel of land granted to said Pierre Chou-

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teau in October, 1799, by Charles Dehault Delassus"—this undoubtedly comprehends all and not merely a part of the concession; the words which immediately follow, and to which alone the court gave effect, to wit: "beginning at Roy's line and running north to Labeaume's land and extending from the river to the common field lots, refers to the last antecedent, the concession; and purports to describe its boundaries and describes them falsely, the certainty appears in the first clause; and if the second is repugnant to it, it cannot stand, much less overrule the first clause; but all doubt is removed by what follows, expressly declaring it to be the intention to convey all the land contained within the concession except that which had before been conveyed, &c., &c. And to this plain and unequivocal expression of intention all other clauses must be conformed. 4 Creuse's Digest, 254-5-6-7; Jackson vs. Loomis, 18 John R. 81; Saunders vs. Betts, 7 Cow. 281; Bott vs. Burnell, 11 Mass. 163; 2 Hill on real property, 343-4.

If these clauses cannot stand together, those only are to be retained which best subserve the prevailing intention manifested on the face of the instrument. Gale vs. Lewis, 7 Ver. 507; Jackson vs. Sprague, Paine 494.

If a part of a deed prove inconsistent on being applied to the premises with the expressed intention of the parties, such part is to be rejected. Hull vs. Foster, 7 Vt. 100. Thus where a survey is referred to in a deed the grantee takes in conformity thereto, though the boundaries in the deed would exclude land included by the survey. Lush vs. Holland, 14 Mass. 149. The least certainty must yield to the greater certainty. While vs. Gray, 9 N. H. R. 126.

When there are several descriptions of the premises in a deed, such construction will be given to it, as will, if possible, satisfy all. Law vs. Hempstead, 10 Conn. R. 43.

In this case, it is clear that the only construction which will satisfy all the clauses is asserted in the first instruction prayed by the plaintiff, and refused, because the boundaries of the concession do include the land between the river and the common field lots, but the court by excluding the first and controlling clause, overrules the expressed intention of the parties and contracts the boundaries so as to include the smallest possible area, contrary to the well established rules of construction. 2 Hilliard on real property, 343; Hibbard vs. Hurlbut, 10 Ver't. 270.

The description of boundaries are always to be taken as strongly against the grantor as may be consistent with the apparent intention of the parties. Marshall vs. Neles, 8 Conn. 361, 369; Carroll vs. Norwood, 5 Har. & J. 163, Mars vs. Hobson, 9 Shepl. 321.

III The deed from Pierre Chouteau to Strother contains no exception of any thing granted. The clause, in the premises, "it being intended to convey to said George F. Strother, his heirs and assigns, all the land within the said concession, except that heretofore sold, &c. &c., is a part of the description of the land granted as explanatory of the intention of the parties, and cannot be rejected for repugnancy. This question depends not upon the words *except*, but upon the nature and legal effect of the clause construed, together with the other parts of the deed. Gale vs. Coburn, 18 Pick. 400. Here the words are merely explanatory of the thing granted, and entirely consistent with the preceding clauses and with the law. It does not affect the out boundaries, or take out of it any part which the grantor had a right to convey; it excepts nothing for himself; it is a mere declaration that the deed shall only pass, and was intended by the parties to pass only that which had not been previously conveyed by the grantor. When the above deed is taken together, as it must be, it is a conveyance of such parcels within the concessions as are not conveyed by previous deeds. Wade vs. Howard, 6 Pick. 499, 500; Moore vs. Fletcher, Shepl. 63; Hill'd. on Real property, 352.

If the clause in question, or something equivalent, had not been contained in the deed, the grantor and grantee would have been subject, each of them, to a fine not exceeding five thousand dollars, and imprisonment not exceeding five years, and they would have been moreover liable for double damages to any party injured by the deed. Rev. Code, 1825, p. 290, sec. 40.

The clause, as it stands, was consistent with the law, and the expressed intention of the

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parties, and no construction will be allowed which would resolve the instrument into a violation of law.

Even when a deed admits of two constructions, one conformable and the other contrary to law, the former must be preferred. 2 Hill'd. on Real property, 325, 4 Creuse Dig. 259.

So also a deed will be consistent, if possible to avoid forfeiture. Jackson vs. Topping, 1 Wend. 388.

Again, in the construction of a grant, the court will take into consideration the attending circumstances, the situation of the parties, the state of the country, and the thing granted, in order to ascertain the intent of the parties. Adams vs. Frothingham, 3 Mass. 352; Leland vs. Stone, 10 do. 459; Nicholas vs. Lewis, 15 Conn. 137.

IV. The grant is not to be restricted or the extent of it enlarged by construction. Hill'd. on real property, vol. 2, p. 324; 4 Creuse, 258. The instruction, therefore, which refers to the jury the question whether Pierre Chouteau had previously sold and conveyed away all the lands within the concession, without reference to any deeds, is erroneous. The court ought first to have determined what the boundaries of each deed were, and then refer to the jury to ascertain the place of boundary according to the construction of the court, in order to determine whether the deeds comprehended all the lands within the concession. Jackson vs. Porter, 1 Paine, 457; Doe vs. Paine, 4 Hawks, 64; Hodges vs. Strong, 10 Vt. 247; Levy vs. Gadsby, 3 Cran. 180; Fowler vs. Bigelow, 10 Mass. 379, 384.

V. The effect of the instruction is to divest the title of Chouteau in the whole tract by a deed which conveys a small part to A. P. Chouteau. The residue belongs to no person in particular. But neither Pierre nor Auguste P. Chouteau can ever acquire a title except under Strother; though every body else may acquire from others a better title than Strothers, and yet, as it seems, if the instructions are correct, Pierre Chouteau could not, notwithstanding his declaration, convey a good title, not by direct conveyance, but by exception from a grant.

VI. It is the well settled doctrine that a deed cannot operate as an estoppel, unless it contains covenants of general warranty, so far at least as the passing of subsequently acquired title is concerned. Comstock vs. Smith, 13 Pick. 116; Dart vs. Dart, 7 Conn. 250; McCracken vs. Wright, 14 Johns. Rep. 193; Jackson vs. Hubble, 1 Cow. 613; Jackson vs. Winslow, 9 Cow. 13; Jackson vs. Peck, 4 Wend. 400; Brown vs. Jackson, 3 Wheat 449; Kensman vs. Loomis, 11 Ohio, 475; Allen vs. Sayward, 5 Greenl. 227; Walter vs. hrs. of Gratz, 1 Wheat. 290; Jackson vs. Bradford, 4 Wend. 622; Davis vs. Hayden, 7 Mass. 257; Blanchard vs. Brooks, 12 Pick. 66; Jackson vs. Walder, 13 Wend. 178; 2 Smith's Lead Ca. 515; Doe vs. Scarborough, 3 Ad. & Ellis, 2.

VII. Estoppels are not favored. Leicester vs. Reboeth, 1 Mass. 180; Bridgwater vs. Dartmouth, ib, 473; Owen vs. Bartholomew, 9 Pick. 520; Mach vs. Dubruiel, 9 Mo. R. 477; 11 do. 119. It is against the policy of our law that estates in land should pass otherwise than by deed.

VIII. The first, fourth and fifth instructions are not only objectionable for the reasons stated, but because they referred to the jury an enquiry without a particle of evidence of the facts.

There is a total absence of evidence tending to show any one of the facts referred to the jury by the three instructions mentioned.

IX. When there are no monuments the land must be bounded by the course and distance named in the grant or deed. McIvon vs. Walker, 4 Wheat. 444; Chenoweth vs. Haskills lessee, 3 Peters, 96; Cherry vs. Slade, 3 Murphy, 82; Hammond vs. Ridgley, 5 Har. & J. 254; Howard vs. Moab, 2 do. 267.

So when monuments that are erected are gone, and their places are not found, the course and distance being named in the deed. Prester vs. Bowman, 2nd Bibb, 493.

So where monuments are named, but are not distinguishable from others of the same kind. Chenoweth vs. Haskell's lessee, 3 Peters, 96.

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Bogy for self.

1. Chouteau intended to sell to Strother all the interest he had in his concession. Where the intention of the parties can be discovered by the deed, the court will carry out that intention. Min. Digest, p. 212; 7 Watts & Sergeant Rep. p. 192; Gibson's opinion, Willis Rep. p. 332, 333; Willis' opinion, 1 Shep'd. Touchstone, (vol. 28, law library) top page 170, 171, 172, (note 79, at page 172,) 175. The remarks of chief justice Willis, in the case of Parkhurst vs. Smith. Comyer's gives the rules of construction to be found in top page, 175, 176, 178, 179, of Shep. Touchstone; 16 John. Rep. p. 172.

2. The construction should be on the entire deed, and each construction should be given, that if possible every part of the deed may be operative. Troop vs. Blodget 16 John. Rep. 172; Shep. Touchstone 86, 87, 88.

3. The construction of the deed should be reasonable. Shep. Touchstone, 86, 87, and taken more strongly against the grantor. Shep. Touchstone 87.

4. A boundary in a deed may be rejected, when it is manifest from all the circumstances of the case, that it was inadvertently inserted, and that a tract of land with different boundaries was bargained for, and intended to be conveyed. 17 Mass. 207, Davis vs. Rainsford.

Thus, if a lot of land be granted, and specifying its number in certain patent and referring to a map on which it is laid down, the whole lot will pass, although described in the deed, to contain a less number of acres than it actually does. Jackson vs. Diffendorf, 1 Caine's Rep. page 493; 7 John. Rep. 217.

SPALDING for defendant.

I. The exception in the deed of Pierre Chouteau and wife to A. P. Chouteau, (being of all that he had personally conveyed) was *void*, if he had previously conveyed the whole of the land, and the deed was in effect, the same as if it contained no exception. In other words, if the exception in a deed, be of the whole that is conveyed, then the exception is void.

Shep. Touchstone, 77, 78. "An exception must be of a part of the thing granted and of part only; and page 79; or if the exception be such as is repugnant to the grant, or doth utterly subvert it, and take away the fruit of it, is void." 28 Law Library; 4 Com. Digest; 167 title "Fait," E. 5 Exception. So an exception of the whole contained in a grant shall be void, as if it releases all his right to such land, except that which he has by descent, when he has the whole by descent, the exception is contradictory and void." 3 Wend.; Woods Conveyancing 329; Cro. El. p. 6; 4 Cruise Dig. 327; 7 Watts & Sergt. 184; Shoenbergh vs. Lyon to same effect.

2 Hilliard 352; 3 John. 375; 8 Conn. 369; 8 New Ham. 96, that an exception to a deed is to be taken most favorably to the grantee in case of uncertainty. 4 Com. Dig. Fait E. 8; 28 Law Libr. 160 (1 Shep. Touchstone 79) if exception be of something not belonging to grantor, it is void.

And in such case, there being a deed from P. Chouteau to Strother for the land, and then a deed from A. P. Chouteau to P. Chouteau, for same, the title enured to benefit of Strother, under the act then in force. Rev. Code 1835 p. 119, sec. 3; Rev. Code 1825 p. 219, sec. 6. There is a warranty in Strother's deed, which operates estoppel at common law.

II. The agreement of Bogy and wife with P. Chouteau, recites that the title to the land in question was reconveyed to P. Chouteau by A. P. Chouteau and wife. This recital operates an estoppel, as against Bogy.

1st. Because it is his admission under seal on an instrument made between him and P. Chouteau, under whom all the parties claim.

2nd. Because it is the formal recital of a fact, not the statement of a boundary or matter of

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description. 2 Smith's Lead. Cases 450 top, 456 side page in Law Libr. 42; 1 Greanleaf Ev. 25; 1 Stark. Ev. 302; 9 Wend. 209; Dyer 196 A.; 2 Smith's Lead. cases 463, American note; 4 Peters 1 to 83, Carver vs. Jackson.

3rd. This deed although made after the suit was commenced, recites that the title was conveyed by A. P. Chouteau, and wife, to P. Chouteau, before P. Chouteau made his deed to Bogy; such is the true meaning of the language.

III. The instrument executed by Bogy to P. Chouteau, may be considered as a bargain, and sale, in its nature, raising a use in favor of P. Chouteau, for valuable consideration, which was executed by the act of Rev. code of 1845, page 218.

IV. The deed of Chouteau to Bogy, and deed of Bogy declaring use, are to be taken together as one; and thus amount to a conveyance by Chouteau reserving power to decline use, and to a declaration of that use in favor of the heirs of A. P. Chouteau, which is executed by the statute aforesaid. 18 Law Libr. 81 (Watkin's on conveyancing 239.) "This assurance, (bargain and sale) admits of future uses. If the use be future, the fee will remain in the bargainor till it can vest in the bargainee."

Ibid. 55. (Watkin's 161) where land is conveyed to a person to such uses as A. B. shall appoint, upon the appointment the statute will execute the use, so that the legal estate which had been suspended, will not vest in the appointee.

22 Law Libr. 52, (Lew. on Trusts p. 1-2) shows the legal estate is transferred to the *cestui que trust*, or use, if the trustee has no agency imposed on him, or nothing to do, &c. but merely to permit *cestui que trust*, to receive rents or enjoy property &c.

21 Law Libr. 26 (Burton on real property 60, paragraph 169, 170) declaration of uses may be made before or after, or at the same time with original deed or assurance, (see paragraph 171, 172, &c.)

4 Wend. Conveyance in trust for a church, which being afterwards incorporated, the statute transposed the estate to the corporation.

Sagden on powers p. 11, sec. 3, first and second paragraphs as to powers, and that when executed, the statute transferred the legal estate to the appointee.

V. If the title passed from Bogy to P. Chouteau by means of bargain and sale, then it enured under our statute, to Strother and his representatives by means of the deed of P. Chouteau to Strother; and if passed under the appointment, it then vested in A. P. Chouteau's heirs, and of course, it was out of Bogy. Rev. code of 1825, p. 217, sec. 6; Rev. code of 1835, p. 119, sec. 3; Rev. code of 1845, p. 219, sec. 3.

The words used in the first act, are as extensive as those in the subsequent revision, and comprehend all cases, and are not to be confined to confirmations and New Madrid certificates. The word "confirmed," also does not apply to New Madrid titles.

VI. By the *Spanish law*, a deed or conveyance to the husband vested the title in him, and his deed alone passed the complete title to a third person, though his wife did not join. *The husband is the head of the community or partnership, and can alienate the property, real and personal, acquired during the marriage.*

2 Febero 164, No. 26, p. 173, No. 45, 46, 47, 48. Note at page 164.

3 Val. Recop. p. 426, law 5 (lib. 10 law 5 title 4,) 5 Mart. Rep. (N. S.) 54; 10 Louis Rep. 146; 6 Louisiana 459; 7 Louisiana 222; 9 Louisiana 135, 453.

The deed to A. P. Chouteau by Pierre Chouteau, contained the name of only *one grantee*, that is A. P. Chouteau, and upon its face, and by its terms, purports to convey to *one grantee only*; of course it must vest title in him only.

VII. That admission in deeds are evidence against parties and privies and entitled to great weight. See Greenl. Ev. p. 220, sec. 189, & p. 245, sec. 211.

HAIGHT for defendants.

The deed from Pierre Chouteau to George F. Strother conveyed to him the premises in fee

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simple absolute or purported so to do. The exception being repugnant to the grant is void.—An exception in a deed to be good must be a part of the thing granted and not the whole of it. Wood's conveyancing Vol. 1, page 329; Shephard's Touchstone, 77-9; Croke Elizabeth 6 244; Creuse Digest, Vol. 4th, recognized in 3d Wendell, Case vs. Haight; Watts & Sergeant's Report Vol. 7, 184.

The exception in this case was of the whole grant and is therefore void. The fact has been found by the jury and the evidence on that point is most satisfactory.

The reconveyance by A. P. Chouteau to P. Chouteau, his father, of the 15th March, 1838, invested Pierre Chouteau with the title of A. P. Chouteau, and by virtue of the statute laws of 1825, page 217, it immediately passed to the grantees of Strother.

Where in a revision of the laws there is not a clear and undoubted intention to change, the old and new will receive the same construction.

An estoppel is a solemn admission by some act or deed which the policy of the law will not permit the party estopped to gainsay or deny.

Greenleaf's evidence, Vol. 1st, page 26, sec. 22.

The recital operates as an estoppel working on the interest in the land if it be a conveyance and binding both parties and privies, privies in blood, privies in estate, privies in law. For an illustration of this principle the following authorities are referred to. 9 Wendell, 209; Carver vs. Jackson, 4 Peters Rep. 83 to 88. Opinion of Story, J.

Chancellor Kent says, "The estoppel works an interest in the land, an ejectment is maintainable on a mere estoppel." 4th Kent's Com. 98, 5th edition; see also Smith's leading cases Vol. 2, 456 (marginal page) note, law library. Bowman vs. Taylor, 2d Adolph & Ellison, 279; 29th Vol. of Com. law page 90th, and other cases cited in the note referred to; 2d Serg't. & R. 515; Goodtitle vs. Bailey, Cowper 597; Rainsford vs. Smith, 2 Dyer 196 (a); 7 J. J. Marshall, 12 Coxe 172, 432; Stone vs. Uye, 7th Com. Rep. 214; Fairbank vs. Williamson, 7th Greenleaf, 93; Sayles vs. Smith, 12 Wendell 57; 15 Metcalf, 180.

The recital which is to operate as an estoppel must be of a particular thing and not a generality to be done. Croke Eliz. 762; Shelby vs. Wright, Willes 9. Note to Smith's leading cases supra; Rainsford vs. Smith, 2d Dyer, 196 (a); 2 Saunders, 215, note 2; 1 Greenleaf's evidence page 32, note 1.

When the deed refers to a generality the party may aver that the matter referred to does not exist but where it refers to a precise thing as in existence at the time of the deed executed the party is estopped from denying its existence. Yelverton's Rep. 227, note 1.

What is stated by way of description in a bond may be denied by the obligor. Ibid Viner's abridgement, estoppel 2. So also in a lease or deed. Green vs. Skipwith, 1 Strange 610; 12 Vermont R. 39; see also Greenleaf on evidence, sec. 26, page 33.

That whatever may be the nature or form of the conveyance if the substance of the deeds is to vest the entire beneficial use in one person such person will be clothed with the legal estate though the conveyance should purport to convey the formal title to another. Such we understand to be the effect, object and intent of the Statute of uses as originally passed in England and adopted here, or rather a similar and nearly the same enactment. Revised laws page 218, sec. 1, of chap. 32, entitled "an act regulating conveyances."

The language of the statute is clear and unequivocal, and if now to be construed for the first time would hardly admit of any doubt. But this is a case of a simple trust and was always executed under the English statute of 27, Henry VIII, whether designated as an use or trust. Levin on trusts 102, law library, vol. 24, page 52, and cases cited by him; Sanderson uses and trusts, 117.

The deed or agreement of 17th Sept. 1846, is a bargain and sale and under the statute vests the legal title in Pierre Chouteau and consequently in the defendant. Thather vs Omans and another, 3 Pick. 521. The ministers of the Dutch church of Schenectady vs. Veedar, 4 Wendell, 494; 18 John, 78; Jackson vs. Root, 10 John. R. 456; Same vs. Fish, 3d vol. R. S., N. Y. App'x. 581; 2nd vol. 722, sec. 47; 21 Wendell, Welch vs. Allen; Burton on real property 38;

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Rev. laws Mo. 1845, 218; Shepherd's Touchstone, 502-6; Brief history of the statute of uses, 9 Cowen 521, per. Stebbins' Sen. See particularly case in 3d Pickering.

NAPTON, J., delivered the opinion of the court.

The first question to be determined in this case is, whether the exceptions contained in Chouteau's deed to Strother were as large as the grant itself, whether the land previously sold by Chouteau embraced the entire tract conveyed to Strother. If this be determined in the negative, all the other points in the case become immaterial.

It is contended on the one side, that Strother's deed embraced the whole original concession and as that concession extended into the field lots some eighteen acres, there was at least this much for the deed to operate on, admitting that all the land confirmed, and all outside of the field lots had been conveyed by Chouteau previously to his deed to Strother. If this be denied, it is further contended, that the previous deeds of Chouteau did not cover all the land within the concession, but that there were narrow slips of ground still belonging to Chouteau, and not embraced in his previous conveyances, which will pass to Strother under his deed. On the other hand it is urged that a fair construction of Chouteau's deed must confine the limits of the land granted by that deed to the eastern boundary of the field lots, that line being specified in the deed as the western boundary of the grant, and Mr. Chouteau having abandoned all claim before the board of commissioners to any portion of his original concession lying within the field lots. It is also urged on this side, that the terms of Chouteau's deeds to Lewis, Carr, and others previous to his deed to Strother clearly embrace all the land lying within the confirmed part of his concession.

The concession to Chouteau was made in 1799 and was described as running on the heights of the Mississippi at the distance of six arpens from the river. It was surveyed in 1803 and included about 133 arpens. In 1809 when this claim was before the board of commissioners, and when Chouteau had previously conveyed a portion of it in the southwest corner to Mr. Lewis, he appeared before the board and relinquished that part of the claim which interfered with the field lots, being then supposed to be about 39 arpens, leaving off the original concession about 93 arpens. The claim in this condition was confirmed. Chouteau by his deed to Strother in 1826 bargained and sold the following tracts of land granted to said Pierre Chouteau by Charles D. Delassus; "*beginning at Roy's line north to Labeaume's south line and extending from*

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the river to the common field lots west, it being intended hereby to convey to the said George F. Strother, his heirs and assigns, all the land contained within said concession, except that heretofore sold, by the said Pierre Chouteau, according to his said several contracts, to be limited by the notes and bonds marked and fixed by the intention of the said parties at the period of contracting."

In Chouteau's deed of 1818 to A. P. Chouteau the general description of the concession, a portion of which only was included in that deed, was couched in nearly the same language. That deed conveyed a parcel of land, "situate at a place called La Grange de terre, containing 20 arpens in superficie, and bounded on the south by land which the grantors had sold to W. C. Carr, east by the river Mississippi, *west by the 40 arpen lots*, and north by land which the said P. Chouteau acquired of Joseph Brazeau and the ditch of the land formerly belonging to Louis Labeaume, and in which aforesaid 20 arpens or more, if it shall be found there is included, all the mound called La Grange de terre, which parcel of land above sold, being the part the most north and *the residue of the concession*, which was granted to said Chouteau by Mr. C. D. Delassus &c."

My opinion is, that Mr. Chouteau did not intend to convey by his deed to Strother any part of his original concession included in the field lots, and this opinion is founded upon various reasons which I shall merely enumerate.

He had abandoned all title to any portion of the common field lots before the board of commissioners, and he could not have entertained the idea, that notwithstanding such relinquishment, he still had any pretensions there.

The word "concession" in the deed is evidently not used in its strict or literal meaning, but as an equivalent for conformation, or the concession as modified by the action of the board of commissioners. In this restricted sense, the term concession, is used in all the deeds relating to this land. In the deed to his son, A. P. Chouteau, he bounds his concession as he does in the deed to Strother by the forty arpen lots and yet he calls it the residue of his concession, which it certainly was not, if by the term concession he meant a part of the forty arpen lots originally included within it.

A critical examination of the language of the deed leads to the same conclusion. He conveys the following tract of land granted to said Pierre Chouteau by Delassus, the spanish commandant, namely: A tract "beginning at Roy's line north to Labeaume's south line and extending

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from the river to the common field lots west." Here is a full and complete description of the land, a description not embracing the original concession but the concession as modified by the board and as claimed by Chouteau. There follows not any further a more minute description of the land, but an explanation of the intentions of the parties as to what portions of this land were to be conveyed. "It being intended hereby to convey to the said G. F. Strother, his heirs and assigns all the land within said concession, except" &c. What concession? surely the one just before described, and which was bounded on the west by the common field lots.

Again, would it not argue most remarkable remissness, to self interest, nay, absolute fatuity, to suppose that Strother would take a deed for a chance title in the common fields, and yet in that very deed in terms exclude the common fields from his grant, by making it his western boundary?

To sustain the plaintiff's proposition we must reject the descriptive portion of the deed, in which the common field lots is specified expressly as the western boundary of the land granted to Strother.

But the deed to A. P. Chouteau would seem to settle this question. It is immaterial in what light we view the term "concession" or how we regard the defined limits "extending from the river to the common field lots," for both the said concession and the western boundary of the common field lots are to be found in both deeds and which ever construction we choose must prevail in both.

It is said, however, that the previous conveyances of Chouteau, to wit, those to Lewis, Lisa, Carr and A. P. Chouteau did not convey all the concession outside of the common field lots or at all events that whether they did or not was a question of fact which the instructions of the court did not leave open for the consideration of the jury. There is certainly much difficulty in locating these several deeds, there may be disputes relative to this matter not necessary to be particularly investigated here, but a comparison of the deeds with the maps or plats has satisfied me, that there can be no serious difficulty except in relation to Carr's extension west. For however uncertain Lewis' beginning point may be, his land certainly runs with Chouteau's south and west lines, how far is not material. It takes in the southwest corner of his tract. Then Lisa and Bates are bounded by him, and Carr by them, and A. P. Chouteau by Carr on the south. Now Carr's tract is rendered indefinite by reason of its calling only for six arpens in depth, when the fact is, as we

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learn from the surveys in evidence, that on his north end there is a little more than six arpens between the river and the common field lots.

Without undertaking to suggest any solution of this difficulty, I think Mr. Chouteau's deed to his son conclusive on this point against the plaintiff, who, according to his own showing, is a naked trustee for Chouteau's daughter-in-law and grand children.

This deed, which was made in 1818, describes the land conveyed therein as "the residue" of the concession. This ought to conclude the grantor. He certainly did not consider that there were any vacancies in his concession, after his deeds to Lewis, Lisa, Bates and Carr and his son, for in the last deed he expressly declares the tract thereby conveyed to be "*the part most north and the residue of the concession &c.*" In whatever sense this term *concession* be used, whether as embracing the entire grant from the spanish commandant or that part of it which had been confirmed, it is equally clear that the result is not charged. The same word is used in the grantor's deed to Strother and with the same meaning.

The supposition then, that Strother was dealing in chances, that he was buying a doubtful title in the common fields or taking the risk in gaps in the titles outside of these fields, is wholly repelled not only by the strongest language in the deed itself, but by all the circumstances preceding, attending and following the conveyance.

In 1822 a contract was executed between Chouteau and Strother and reduced to writing, by which Chouteau agreed to convey to Strother "a tract or parcel of land, lying upon the Mississippi, extending upon the bank of the river from the tract of land sold by the said Chouteau to W. C. Carr to a tract formerly sold by Labeaume to W. Christy, according to conveyance from Braylen to Labeaume, and running with each of their lines back to embrace the big mound. The said tract of land to contain at least 30 arpens, with covenant against incumbrances and all other reasonable covenants." The tract here described is obviously the same which Chouteau had conveyed to his son in 1818 by a deed which was then standing on the records of St. Louis county. What becomes then of the argument derived from our statute, which prohibited under penalty of fine and imprisonment, the conveyance of a title previously conveyed to another? If this statute was to prevent Chouteau from attempting a conveyance of this land, in 1826, because of his previous conveyance in 1818, why did it not have that effect in 1822, when beyond all controversy he treated it as his own and executed a formal contract for its conveyance?

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Chouteau undoubtedly agreed to convey this land in 1822 to Strother. He did attempt to convey some portion of the concession in 1826, a survey of the land so conveyed was made in 1826 in his presence and under his directions and embraced the very tract previously conveyed to his son; possession was given to Strother, who sold the land to a company, and this company has been in possession for nearly twenty years. And although Mr. Chouteau obtained a reconveyance of this land from his son in 1838, that deed was not placed upon record until 1845, on the same day that another deed from himself to the plaintiffs, Bogy and others from the wife of A. P. Chouteau to Bogy were recorded, this action of ejectment was brought about a month thereafter.

I am aware, that these circumstances, supposing them to be incapable of contradiction by counter proofs, will avail Strother's assignees nothing in an action of ejectment. They are merely alluded to as rebutting the positions which were strongly insisted on, that Strother's deed was the result of a speculation in the common fields. On this point, I am fully satisfied. I entertain no doubt but that Strother thought he was buying and Chouteau supposed himself to be conveying, the identical tract of land which Chouteau had conveyed in 1818 to his son. Why such a purchase and conveyance should be made with an outstanding deed in another or why it should be couched in such an equivocal deed it is useless to enquire. Suppositions might be made entirely consistent with good faith on both sides, but I shall not stop to examine them. For some cause, Chouteau considered himself at liberty to treat this title as his own, from 1822 to 1826.

He contracted to convey it in 1822, and attempted to convey it in 1826. The only question is, did he succeed? Have Strother's assignees the legal title? For if they have not, it matters not in this form of action, what may be their equitable rights.

The deed from Chouteau to Strother, after purporting to convey the whole concession from the river to the common fields, and from La-beaume's ditch to Roy's north line, excepted from its operations all the land in the concession previously granted by Chouteau, and it turns out, that all the land had been granted; that in addition to the grants to Lewis, Bates, Lisa and Carr, there was a deed on record, conveying the residue to his son A. P. Chouteau. Was Strother's deed then waste paper, or was it operative to transfer the title which Chouteau obtained from his son in 1838?

The doctrine of exceptions about which a good deal has been said at the bar, affords no decisive answer to this question. If a man conveys

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a tract of land, excepting such parts as he has previously conveyed, the exception amounts to nothing, for he cannot convey that which does not belong to him. And if the parts excepted embrace all the land, the deed must stand merely as a conveyance of a tract of land to which the grantor has no title. No question can arise on such a deed, except in the event of an after acquired title by the grantor. That is the decisive question in this case.

But before examining this question, it is proper to explain more fully, our views concerning the common law doctrine of exceptions in a deed, upon which a good deal of stress has been laid in the argument. The learning on this subject is to be found in Touchstone. In that work an exception is defined to be "a clause in a deed, whereby, the feoffor, donor, grantor, lessor, &c., doth except somewhat out of that which he had granted before by the deed." It is, therefore, laid down, that an exception to be valid, must be part of the thing only, and not all, and it must be of such a thing as he that doth except may have and doth properly belong to him. "If the exception extends to the whole thing granted or demised, it is void:" This maxim seems to rest upon the case of *Dorrell vs. Collins*, (Cro. Eliz. 6,) where the master and scholars of the college of Singfort, were seized of the manor of Hadley, and let all their lands in Lambhurst, except the manor of Hadley, and the master and scholars had no other lands in Lambhurst, except the manor of Hadley, and the court held that the manor passed.

It may appear a little absurd to put such a construction on a deed; for the leading rule in the construction of all contracts, is to ascertain the intention of the parties, and to say that a grantor intends to part with that which in his deed he expressly says, he does not intend to convey, but means to reserve, would seem to run counter to this rule. But a closer observation will satisfy us that this rule of the common law, for the construction of exceptions, like most of the others which have been engrafted in that system, is founded on common sense and common honesty. There is evidently, in such a deed as that referred to, in *Dorrell vs. Collins*, a manifestation of two intents, directly conflicting, which must either annihilate the conveyance, and make it a nullity, or one of which must yield to the other. There are other rules, which then apply to make the deed stand. The first clause in a deed and the last in a will must govern, and a deed must be so construed as to stand, rather than to fall. The grantor intends to part with something. The deed is not made, and a consideration advanced for nothing. It is to be construed most strongly against the grantor. If obscurity has arisen, it is but right

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that he should bear the loss. As he placed the matter in doubt by indicating two contradictory intents, both of which cannot stand, all these rules or principles alluded to above, require that the deed shall stand—that something shall pass, and as we cannot separate the excepted portions where they cover the whole grant, the whole land passes.

It is plain that Chouteau's deed to Strother, does not contain any such exception as is referred to, in the case of *Dorrell vs. Collins*. Chouteau does not reserve any thing to himself. He merely refers to his previous grants, and declares it not to be his intention to pass by that deed, what he had previously sold to others. This would have been the effect of the deed, had no such declaration been made. The exception is nugatory for any purpose, unless it be to prevent the application of the common law or our statutes, in effecting a transmission of the title, he subsequently acquired from A. P. Chouteau, and of this we will now enquire.

It must be admitted, that a very great diversity of opinion has existed, both in adjudged cases and in the treatises of law writers, as to what description of conveyance will pass on after acquired title. Nor are they much better agreed as to the principles upon which such a transmission of title is effected, in cases when all acknowledge the subsequently acquired title passes.

By some it is contended, that no conveyance except the common law feoffments or fine and recovery, could have the effect of passing a legal estate, which the grantor had not at the time, and that neither a general warranty, nor any mere estoppel could affect the legal title.

On the other hand, it is maintained by the decisions in New York and Pennsylvania, and in all the New England states, that a conveyance under the statute of uses, a bargain and sale, if accompanied with a covenant of general warranty, will operate upon a title which the bargainor did not have at the time of the conveyance. The new title is supposed to enure by way of estoppel, to use of the grantee and his assigns. Although nothing passes by the deed, as the grantor had nothing, yet as the grantee may recover the value of the land upon his covenants, he is estopped from using his subsequently acquired title. At the same time it is conceded, that where the covenant is restricted to a mere warranty of the title granted or released, no such consequence follows: where the grantor does not undertake to convey an indefeasible estate, but only such title as he has, and agrees to warrant it only against all claims derived from himself, he is understood to refer to existing claims or incumbrances, and not to any title he might afterwards derive from a stran-

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ger. *White vs. Patten*, 24 Pick. 324; *Comstock vs. Smith*, 13 Pick. 116; *Jackson vs. Bradford*, 4 Wend. 622; *Jackson vs. Hubble*, 6 Cowen 613; *Dart vs. Dart*, 7 Conn. 256; *Chew vs. Barnett*, 11 Sergt. and R. 389.

It is not material in this case that the effect of a general warranty in a deed should be determined, as there was no such covenant in Chouteau's deed. We have a statute, however, in relation to conveyances, which is designed to have a bearing on this subject.

The Revised Code of 1825, contains this provision: "If any person shall sell and convey to another by deed, a conveyance, purporting to convey an estate in fee simple absolute, in any tract of land or real estate, lying and being in this State, not then being possessed of the legal estate or interest therein, at the time of the sale and conveyance, but after such sale and conveyance, the vendor shall become possessed of, and confirmed in the legal estate to the land or real estate, so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee, *and the conveyance aforesaid, shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance.*"

This statute applies to cases where the vendor is not, at the time of the conveyance, possessed of the legal estate or interest in the land conveyed, but afterwards becomes possessed of or confirmed in the legal estate. It is argued, however, that the act is limited to cases where the vendor has the equitable title, and does not read a case where the vendor has no title at all.

The language of the act requires no such limitation. A vendor has not the legal estate, either where he has an equitable title only, or where he has no title at all. There is nothing in the terms of the act which authorises a restriction of its provisions to only one of these conditions. Is there any thing in reason or justice, which requires such a limitation? I confess myself unable to perceive any. I think it was the intention of the legislature to give the legal title to such as had *acquired an equity* by the conveyance, and this did not depend upon the character of title, which the vendor had at the time of his deed, but upon *the character of the deed itself*. A deed may be upheld in equity, although the grantor had nothing at the time of its execution, if the consideration be sufficient and it is against good conscience in the vendor to permit it to be defeated. Thus the partition or settlement by heirs of a mere expectancy has been upheld in chancery. (1 Vercy 391) and where it has been accompanied with a warranty, it has been regarded as transferring the title

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even at law. *Jackson vs. Bradford* 4 Wend. In Pennsylvania, where they have no courts of equity, and the action of ejectment is therefore, not confined to mere legal titles, a bargain and sale has been held to pass the after acquired titles, upon this very principle. Equity will enforce a covenant to convey, and *a fortiori* a conveyance. *McWilliams vs. Nisby*, 2 S. & R. 515. Our statute was intended to do what the courts in Pennsylvania have done in the absence of a chancery system.

It then depends upon the character of the deed, whether it is to be affected by our statute. It must be a conveyance, purporting to pass the *fee simple absolute*.

This language is not certainly used in a technical sense. The term *fee simple* is known at the common law as one which defines the quantity of estate. It is used in contradistinction from a fee tail, a life estate or a term of years. It is evidently, not employed in this sense in this provision of the act. It was surely not intended, that a quit claim deed, although the deed uses language to pass the fee, and not any smaller estate, would, therefore, pass a new title, not belonging to the grantor when he makes the deed. It was hardly intended to apply to a deed, conveying all right, title and interest of the grantor. Such a deed will, undoubtedly, pass the land itself, if the grantor has an estate therein, at the time of the conveyance, but it passes no estate which was not then possessed. *Brown vs. Jackson*, 9 Whea. 452. Nor would it be in accordance with the manifest intent of such conveyance, that after acquired titles should pass. So where a party had a vested interest, and also a contingent remainder in lands, and conveyed "all his right, title and interest," the deed was held only to convey his vested interest, although in this case the deed contained a general warranty. The warranty was held to be only co-extensive with the grant, and therefore, not estopping the grantor from claiming the contingent interest when it vested. *Pell vs. Jackson* 11 Wend. 110.

A deed purporting to convey a *fee simple absolute*, is not then, in my opinion, a deed which merely conveys something more than a fee tail, or life estate, or term of years. The statute intended something more than this. The term *absolute* gives a clue to the meaning of the whole phrase which I think is drawn from common usage, and not from the technical phraseology of law writers. Every man unlearned in the law understands what a deed conveying a *fee simple absolute* is. They understand it, as I humbly apprehend, to be a deed which purports or professes to convey an indefeasible title—not a quit claim deed, not a deed merely transferring the grantor's interest, be it more or less, but a deed con-

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veying the land itself, and professing to convey it in such a manner that the grantee is not to be disturbed in his possession by any one.

It may be then, that our statute was intended to settle a question, which had been much discussed, and about which there was certainly great conflict of opinion; whether a general warranty would operate to transfer a subsequently acquired legal title. It, undoubtedly, settles this question in the affirmative, and I think it goes further. It puts the whole question upon principles of sound sense and strict justice. It does not limit its operation to deeds containing covenants of general warranty, but it extends to every deed, which purports to convey a fee simple *absolute*, whether it contains a general warranty or not. It is easy to imagine numerous cases in which there are conveyances obviously intended, and purporting to convey absolute titles, but which omit any covenants of warranty. It does not reach, and ought not to apply to a deed, where the grantor expressly guards against such inference, by inserting a special warranty against his own acts, and those claiming under him.

Chouteau's deed to Strother, purports to convey a tract of land, described as extending from Roy's line north to Labeaume's south line, and from the river to the common field lots west. The exception of all this tract, is a subsequent part of the deed from its operation being repugnant to the main purpose of the deed, as we have before observed, is nugatory and void. It is said that if a man grant his house, chambers, cellars and shops, excepting his shops, this is no good exception, for as the shops are expressly granted, the exception of them is repugnant to the grant. "Or if the exception be of such a thing as the grantor cannot have nor doth belong to him by law; as if a lessee for years assign over all his term in the land, excepting the timber, trees, earth or clay, this exception is not good. In this instance the exception is void for want of interest or ownership in the thing excepted." *Shepherds Touchstone*, 7. These principles, as we have already shown, apply to Chouteau's deed. The deed would have been precisely the same in law if the exception had been omitted. We treat it then as a deed for a specific tract of land to which Chouteau had no title. Did it purport to convey a fee simple absolute? The deed contained this special covenant: "and the said Pierre Chouteau and Bridget his wife, do hereby, warrant the same free from the claim of themselves and all persons claiming under them, except those who may have deeds recorded in the clerk's office of St. Louis, according to the modifications of said claims, aforesaid described." Treating the exception to the covenant as a mere nullity, it was then merely a covenant against the claims of the grantor,

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and those claiming under him. It was no warranty against existing incumbrances. It was a mere quit claim deed. It did not purport to convey a fee simple absolute.

The questions in relation to Mrs. A. P. Chouteau's interest, and the supposed estoppel in the deed from P. Chouteau to Bogy, do not seem to be material in the view we have taken of the case.

Mrs. Chouteau's interest was either a right of dower or a community interest under the marriage contract. In either case it was not a legal estate upon which ejectment could be maintained. The deed from P. Chouteau to A. P. Chouteau, was made after the introduction of the common law, and if Mrs. A. P. Chouteau, by virtue of her marriage contract, acquired a right to one half of the land so conveyed, it was only an equitable right. Neither a private contract nor the Spanish law could control the law of conveyances.

If two persons should now agree that all the lands which the one or the other acquires, should belong to both in common, that agreement will not prevent the one, to whom a conveyance is made, from having the legal title. The rights of the other under the contract, can only be enforced in equity. The marriage contract between A. P. Chouteau and his wife would only give the wife an equitable title to one half the land conveyed to the husband, after the introduction of the common law.

Judgment reversed and cause remanded.

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1. A motion to postpone a trial in a criminal cause, is addressed to the sound discretion of the court. The supreme court will not interfere with the exercise of such discretion unless it appears to have been used unsoundly or oppressively.
2. Where the declaration of a prisoner is given in evidence, the jury may reject that part which is in his favor and believe that which is against him.
3. Upon a trial for murder, the dying declarations of the deceased made with regard to the circumstances which produced his death, are to be received with the same degree of credit as his testimony would be if examined on oath as a witness.
4. Deliberation, premeditation and malice, may be inferred from the circumstances connected with the killing.

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5. If malice appears to have existed at the *time* of killing, it is sufficient, and it is not necessary to prove that it existed any length of time previous.
6. All persons who are present at the time of killing are principals, although only one perpetrated the act, provided all are proven to have confederated and engaged in a common design, of which the act of killing is a part.

APPEAL FROM CAPE GIRARDEAU CIRCUIT COURT.

ENGLISH for defendant.

1st. The court should have continued the case over for a few days, on the affidavit of defendant, for evidence material to him in the defence. It was a question of sound discretion to be exercised for the promotion of justice, and in a spirit of mercy. The affidavit makes a sufficient case, and the decision of the court was oppressive in forcing the trial under the circumstances.

2nd. Malice must be proved; it cannot be presumed in the case of murder. Whatever of doubt there may have been, should have been construed favorably to the defendant. There was no evidence of malice. 1 Rus. Cr. 422, (n) Coffee vs. The State, 3 Yeager, 283.

3rd. Force may be repelled by force; and if death ensue, he that acts in the defence is justifiable. 1 Rus. Cr. 549; 2 Stark. 523; Rus. Cr. Ev. 638, 640, (Ford's case) 4 Black. 180, 183; Mo. Stat. 344, sec. 4, 5 and 6.

4th. To render a party guilty as principal, in the second degree, he must be present, aiding and abetting at the fact, or so near as to render assistance, if necessary. There was no proof to justify the finding in the case. 1 Rus. Crim. 22, 28, 32, 393; 4 Black. 35; Rus. Cr. Ev. 167, Commonwealth vs. Knatt et al.; 9 Pickering, 496; 1 Rus. Crim. 25; Rus & Ry.; 25, 113, 251, 332.

RYLAND, Judge, delivered the opinion of the court.

This was an indictment, found by the grand jury of Wayne county, at the circuit court, at March term, in the year 1849, against Thomas Stuart, Noel Green, William Green, Alfred Green, and William Cobb, for the murder of George Marr. The defendants were arraigned and plead not guilty to said indictment, at the term aforesaid, and also filed their petition praying for a change of venue, which petition was allowed and the venue changed to the county of Cape Girardeau.

At the May term of the circuit court in and for the county of Cape Girardeau aforesaid, the circuit attorney moves the court to have the prisoners brought into court. Whereupon the defendant Noel Green is brought into court and moves this court to continue this case to some day during the present term of the court, and files his affidavit in support of his motion, which affidavit is as follows, to wit: "Noel Green, the prisoner, makes oath; that the testimony taken before the committing justice in this case in the county of Wayne, where this indictment was found is material and important for him on the trial of this cause;

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he did not know until yesterday, that it was material or that it was not here, he is informed and believes it is in the possession of the jailor of said Wayne county, he affiant, on yesterday sent an express for said testimony and believes he can procure it during the present term of this court, he knows of no testimony present by which he can prove the same facts, he expects to establish by said absent testimony; his object is not delay. The said testimony is not absent, by his connivance or consent, he therefore asks for a postponement of this case for some other day during this term.

his

NOEL X GREEN.

mark.

This motion to postpone was overruled, and the defendant excepted to the opinion of the court. The case was tried, so far as Noel Green is concerned; he being tried separately. The following facts were given in evidence before the jury by the witnesses as named (viz.)

The testimony of Alexander S. McDonald. He was acquainted with George Marr; the last time he saw him alive, was on the 30th of January last; he was between twelve and fourteen years old; he does not know whether George could read or not, he was a boy of common intellect. At the time witness last saw him alive, he was lying at the root of a tree, in the woods, stabbed in the left side, below the shoulder blade; and on the right side of the face, the wound on his side looked like it was stabbed with a knife about an inch wide; when witness found him, he appeared very weak and was bleeding, witness asked him, if he could get up, he said yes, but could not rise, he lived fifteen or twenty minutes, witness thinks he was in his proper mind; asked Marr, if he knew him, said he did, and called him by his proper name; witness dont know how deep the wound was, he bled right smart; after he took him up, died (as witness thought) on the way as he was taking him home; he thought he was dead, witness did not see him breathe after he took him home; he said nothing about dying or hereafter, when the witness first saw him, he asked him if he could get up; he attempted to do so, but could not, witness did not know his age, only supposed he was twelve or fourteen years. John Morgan, a witness; said he did not know much about George Marr's capacity; did not know whether he could read; in point of mental capacity, he was about like common boys; he would weigh about one hundred pounds; dont know of his going to church, thinks the boy was twelve or thirteen years of age, never heard him speak of religion, Heaven or hell, the boy never was a witness; does not know, that the boy would know the obligations of an oath,

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should think he would know better than to tell a lie. Albert Morgan, says he has known George Marr 8 or 9 years, thinks he could read a little, recollects his being at church once, knows of his attending prayer every night, since the first of August last, dont know whether voluntarily or by compulsion. The deceased was considered a truthful boy, of ordinary intellect, as much so as common boys: deceased came to witness' fathers to live, last spring two years, and continued to reside there up to the time of his death, never heard any body speak of his truthfulness: he was truthful as far as witness knew, was 12 or 14 years old.

The State now proposed to give in evidence the dying declarations of George Marr. The prisoner objected. The court overruled the objection and permitted the dying declarations to be given in evidence, and the prisoner excepted. Alexander S. McDonald recalled. Stated he asked George Marr, who stabbed him, he said Stuart stabbed him, said nothing more on that subject: The way he came to find him, he had started to hunt for those who had not come home. The sister of deceased found him, and called witness, she had left him when witness got to him, saw no marks of a scuffle, nor blood nor weapons on the ground where he found him; he was by the side of the road leading from Morgan's house to the place cultivated by Morgan down Perkins creek, about half a mile from Morgan's house or over; Morgan's lower place on Perkins creek about a mile and a quarter from his his house, found him in Wayne county, Missouri; found the deceased betwixt one and two o'clock, his sister had found him a few minutes before, had not left him more than five minutes. It had rained that day; saw no tracks of any persons, ground was wet, deceased died twenty five or thirty minutes after he put him on the horse; had gone 150 yards when he asked him who stabbed him, thought he was dead when he got half a mile. The boy did not mention the subject of death, witness told deceased he was going to die; and he had better pray, he said he could not; this was after deceased had told him, who stabbed him.

Thomas Hamilton, stated, Noel Green, the defendant told him (the witness) about a fight, on the evening of the last of January or first of February last, can't tell exactly the words; they were in a fight, him and two of his brothers, and Stuart had a fight with William Morgan and two of his brothers-in-law, told him they came running out of the head of a bushy hollow and attacked prisoner and his company: Morgan came with his gun presented as if he was going to shoot, threatened to shoot if they did not leave there, cursed them: Stuart answered, that

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he would not go until he got ready, Morgan presented his gun, as though he was pointing at Stuart, snapped twice, then took a rest, and fixed; then Stuart fired: prisoner begged Morgan not to shoot, there were other ways of settling difficulties without shooting, but he did shoot: prisoner then raised his gun to strike him, but Morgan came round the tree, got the start of him, struck at him the prisoner, knocked his gun out of his hands and knocked him to his knees, as he rose, Morgan again struck him and knocked him clear down: At that prisoner gets Dick's gun and twisted it out of his hands and aimed to break it round a tree, but the thought struck him, that he would not, and he threw it away. At that time prisoner heard Morgan halloo murder, and asked Tom Stuart for God's sake to spare his life, prisoner then walked towards them, as they lay in a branch, several together, prisoner did not say how many. Then Stuart quit, and Morgan got up and walked off about ten steps, prisoner walked after him a few steps, Morgan turned round and said, "Noel, I'll quit now, I'll fight no more," witness asked prisoner where the boy was, he said he was there, but did not say where, asked him, if he was not in the fight, he said, not that he knew of, asked prisoner if he thought any of them were badly hurt, he said he did not think they were, asked him, which way they went, said, Morgan went one way and Dick Marr the other, said Morgan sat down by a log, and the boy, the last he saw or him was sitting by Morgan and appeared as though he was talking to him, the boy was not hurt as he knew of, the prisoner then said they gathered up their tools and went home. Prisoner's first statement was, that he and two brothers, Stuart and Cobb were in the woods peaceably cutting house logs, this conversation took place on the road, they met a traveller and witness was told the boy was killed, he again spoke, the prisoner, and told him, "he thought the boy was hurt," prisoner said he was not, that he knew of, cross examined. Stated that he dont know, that he has stated all that passed, he has stated the substance, to the best of his recollection, prisoner told him, Stuart was wounded, saw wound on the arm of prisoner, prisoner told him, his brother William's, head was cut open. Witness found cut on Stuart's arm, found a cut on William Green's head, saw a slight bruise on a younger brother, prisoner told him, they were in the woods on Congress land peaceably cutting house logs, were engaged in that, when the others came charging on them, witness lives about twelve miles from the scene of the fight, witness was away from home when prisoner came to his house he found him on his return in his shop, this was about sun set, came for him to go to see Stuart, went with him,

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conversation took place on the road. Found Stuart at Lewis Green's, witness staid all night so did prisoner, Catherine Morgan on oath says. She is acquainted with George Marr, saw him at William Morgan's the morning of the affray, dont know of his leaving William Morgan and Richard Marr even then. The last time she saw him was after late breakfast time, next time she saw George was when McDonald brought him home; he gasped for breath, after he was brought in, dont know the time of day he was brought, it was between ten and two o'clock; she missed them all about the same time to-wit: Morgan, Richard and George Marr. Thomas Hamilton recalled, saw wounds on George Marr on the side of his face, one on the back, didnt examine them, cross ex'd The wound on Stuart's arm was cut nearly half way round, cutting an artery, bled very much, produced great debility, confined him to bed, went to Stuart as physician, he could not get up, did not see him up.

John Gibson, said: I am acquainted with Noel Green, never saw George Marr, but once before saw him dead, was at Lewis Green's the day of the difficulty, saw Stuart, Cobb, Alfred and William Green, Stuart was in bed, his arm bound up all bloody: did'nt see Noel, was between 12 and one o'clock, saw Morgan and Richard Marr at Carltons that morning alive, saw them in the evening after they were dead, about half mile from Carltons: heard their guns fired, after he saw Morgan whilst at Carltons at work, heard noise, like men fighting, then heard one halloo afterwards not quite in the same direction, so little difference in direction cant describe it, it was to the left of the first noise right smartly, saw the bodies of Morgan and Richard Marr near a north course from where he was at work: Morgan's house was something near the course from him of the single halloo in going from where he was to Morgan's house, would go something like 200 yards to the left of the first noise. The bodies were found in Wayne county, could not tell, what the second halloo was for, it was just a halloo. Morgan had a gun that day; saw it since at Morgan's, saw it on the battle gound, it did not look like it was broke, saw another gun then, it was a good deal broken in the stock, cross ex'd. The distance from where witness was to the battle ground was about half a mile, the noise was like men fighting, can't give any other description, did'nt have Morgan's gun in his hand, can't describe it, it was a rifle; the second noise appeared right smartly further off; the noise was about half a mile from him. The second noise was about 200 yards from the first, the reason, he took the course was, he expected a fight. Stuart had entered some land, nearly on the course, where the noise was. Don't know whether fight was on

Stuart's land or not. Morgan told him that morning, he had came by where Stuart had been at work. Morgan's field was about 200 yards from the battle ground supposes it was Morgan's, saw Morgans people gather truck out of it, Stuart entered part of it.

Alexander S. McDonald recalled, has been living in the neighborhood 18 months, don't know any body by the name of Stuart in the neighborhood except Thomas Stuart.

John Eaker, never saw Noel Green until the day he came to Dr. Hamilton's the day the battle is said to have taken place; heard him speaking of the scrape he supposed; heard him say, himself, Stuart, Cobb and his two brothers were in the woods cutting house logs. Morgan, Dick and George Marr came to them. Morgan slipping up like he was going to shoot a deer, about 30 yards off. Morgan cocked his gun, snapped at Stuart's breast. Prisoner told Morgan, there were other ways of settling difficulties without shooting, he made no answer, but he snapped again, and then fired. After Morgan fired, Stuart fired at Morgan. Stuart's ball struck a tree about two feet above Morgans head: Then Richard Marr, shot, as his, prisoner's brother said at him the prisoner. Witness asked if any were hurt, prisoner said, he did not know, asked him, where the Morgans were, he said he left them there, witness asked him again if any of them were killed, he said he did not know, he asked him a third time if any were killed, he said he expected there was two or three, but didn't say positively: witness asked him if any knives were used, prisoner said, he expected there was, when they got into close work. Don't recollect about prisoner saying any thing about having a gun himself, prisoner did not say who he thought was killed, he expected there was two or three; prisoner said his father told them the night before, they would have a scrape, and they had better prepare themselves, they did so, but didn't expect to have such a scrape as they had; didn't say how they prepared. Cross ex'd. This was either first of February or last of January, it was something after 12 o'clock, don't recollect whether he had eaten dinner or not; prisoner came for Doctor Hamilton, to go to see Stuart, who had got his arm cut; in speaking of the killed, prisoner did not mention either party, conversation was in the shop of Dr. Hamilton, Dr. Hamilton was present, except whilst he went out to catch his horse. Thomas Williams was present all the time, it took place a few minutes after prisoner got there. First Dr. Hamilton and prisoner were talking of the circumstance and the witness asked these questions; prisoner said Marr shot at him, so his youngest brother told him, they were about 30 yards

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off when prisoner first saw them. Morgan said clear out you damned rascals, then raised up to shoot, said it occurred that day about one and a half miles from Morgan's in the woods, prisoner said, I expect there was two or three killed and dropt his head so; said they went to fathers that night; that Stuarts arm was cut very badly, he hurried off for the docter. George Marr was hewing away at Stuart, cutting away with his axe, re-examined by State. Prisoner did not see Marr shoot at him, he had his eye on Morgan, thought him the stoutest man.

Allen Carlton says Morgan and Richard Marr were in his field the morning of their death, a little more than a quarter of a mile from the battle ground. He afterwards heard three guns fire, a noise like men quarrelling and jowring. This was half an hour after Morgan left. Gibson was with the witness: They went north course. Saw Richard Marr's gun, he afterwards saw broke off close to the guard, it had a half stock, Morgan's had a whole stock, Morgan's gun was not broken as he could see. Witness is not acquainted with any Stuart, but Thomas Stuart, has been living in that neighborhood six years, witness saw logs where the affray took place, they looked fresh cut. Morgan has a field something over 200 yards from the place, used to have a house 170 yards from it, but the house is gone, cross ex'd. Heard chopping that morning, not exactly in the direction of the battle ground, was not on the ground till late in the evening: saw 2 guns there and an axe, he did not hear the guns in the same direction of the chopping; did not leave the field where he and Gibson were at work for half an hour after he heard the guns; did not hear any single halloo at all that day, after the noise of the fight; the reason he did not go, where he heard the noise, was that he expected that somebody was killed, and did not wish to get into difficulty: John Gibson and witness were close together, when they heard the noise, stayed together till dinner. Morgan left the old place where the house was over six years ago, did not hear any seperate noise, heard an axe before the affray, saw fresh cut logs on the battle ground; there is no house or field on the old house place, supposes the logs were cut on public land.

Samual Manedy, says when he came to the battle ground, saw Richard Marr lying across a log, about 30 yards off was Morgan dead. Next morning at Morgan's examinend the wounds. On Richard Marr, found five, three near the left nipple, one on the right side, one on the left side. On William Morgan were nine stabbs, seven on the body, one in the thigh, one in the hand. On George Marr was one in the side of the face, from the mouth to the ear, one on the left side, Morgan had a knife

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in his scabbard, a double barrell'd pistol in his pocket, caps on the tubes. In the wound on George Marr he thought he could see the caul fat: it was on left side under shoulder blade, saw two guns and one axe lying close to body of Richard Marr. Knows Thomas Stuart, has lived in two miles of him, has lived nine or ten years there, knows no other person in the neighborhood of the name of Stuart, except Thomas Stuart. Morgan's gun was lying on a tree top, like it was half cocked. Marr's gun was broken, it had half stock, cross ex'd. Saw the pistol and knife on the morning after the fight, the pistol was in the right pocket. I looked at the pistol as one of the jurors of inquest, took it out of the pocket and saw caps on the tubes. This was about day-light, it was in the month of January, but don't recollect the day of the death. Richard Marr was lying about thirty steps from William Morgan on the battle ground, did'nt know who took the guns there, both guns were Morgan's; the fighting was done in Wayne county in the woods, where there was no field, there were bushes and undergrowth; there were bushes on the north side of the battle ground. There was undergrowth all around. Morgan lived one mile and a quarter or a half distant. I did not examine the body of Morgan in the woods: we found the pistol next morning, it appeared as if there had been rain on the bodies before they were removed. Morgan was a stout, strong man.

John James, says: I saw William Morgan and Richard Marr, on the battle ground, on the last of January or first of February: saw Morgan's gun and an axe on the first evening, next morning went back and saw another gun, called Richard Marr's gun, Morgan's gun was lying half cocked, the pan was open, next evening picked up Morgan's gun, Myers blew in it, no wind came out, we picked out something of the appearance of wet powder, out of the touch-hole, carried the gun to Mr. Morgan's, there unbriched her, and got a ball and wet powder out, the gun was lying on the second day, half cocked and pan open, just as she was before, as nigh as he could tell, when he noticed the gun the pan was loose, if the muzzle was turned down it would open; one of the gun's had a flint lock, the other a percussion, Richard Marr's was a percussion lock; Richard Marr's gun was half stocked, a piece about one foot long was broken off of Richard Marr's gun, the piece of the stock was picked up on the ground. There was a piece of a gun stock between Morgan and his gun, it did not belong to either, only saw one piece besides Marr's, that was about one foot and a half long. Cross examined: It was something like sun down when witness first came upon the ground, knew Morgan's gun, saw Richard Marr's gun next morning, on the first

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evening saw an axe, but didn't know whose it was, has not seen it since, that he knows of, supposed to be Morgan's. Hahn Carlton and Bellinger were on the ground when he went there. The broken gun was some little nearer to Morgan than his own, don't recollect that he noticed any shoe tracks. When Myers blew in Morgan's gun no wind came through, we got wet powder and a ball out, but saw no patching, there had been a hard rain in the forepart of the first day. Again examined by the State, says, he knew Thomas Stuart, knew no other Stuart in the neighborhood. The guns were something like fifteen steps apart, Marr's gun was fifteen steps from Morgan's gun, Morgan was fifty steps north of Marr, Morgan's gun was about twenty steps from him, the axe lay a north-east course from Marr's gun, on the battle ground, don't know for certain, but thinks the axe was nearer Morgan's gun. He examined the bodies of William Morgan and Richard Marr, Morgan was wounded on his head, about the length of his finger, wound about one half inch wide and cut to the skull, but the skull was not broke, as he could discover, there were seven wounds on his body, one in his hand and one in his thigh, three were about one inch and a quarter wide. Richard Marr had five stabbs, three around the left nipple, the other two in the right side, opposite the heart. Cross examined again: The entry of land made by Stuart, was made down about the battle ground, taking a part of Morgan's farm, takes a part of the field, where the battle ground was in the woods.

Samuel Thomson, says: He heard Noel Green give testimony in the case of Thomas Stuart the other day, said they were at work cutting house logs, when Morgan and the two Marrs came up, out of the head of a thickly hollow, towards them, when they got in a short distance Morgan said, here you are, you damned son of a bitch, told him to clear himself, or he would blow his brains out. Stuart told him, he would not go 'till he got ready, he advanced on to where they were, and laid his gun up by the side of a tree and snapped twice, his gun apparently presented at Stuart, the third time it fired, Richard Marr shot at him, (Green,) Morgan went on towards Stuart, came close by him, and knocked him down with his gun, and went on and knocked Stuart down with his gun, first he saw when he got up, George Marr was striking at Stuart with his axe, while Morgan had him down, it struck Stuart about the side somewhere, said the axe seemed to hang in his clothes, Morgan told Stuart to quit, he had enough. Morgan came walking away, and he, Green was going across, Morgan told him not to follow him he had enough, then said we all left there and went together home, last he saw

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of them, Morgan was setting on a log and George Marr was holding his hand, George was not hurt as he knew of at that time, they went to old man Green's. Cross examined, Noel Green said: Stuart got a bad cut on his arm, don't know positive as to what he said, Morgan said, but thinks he said damn son of a bitch, was speaking to Thomas Stuart. This was all the evidence given in this case.

Upon this state of the case, the State by the circuit attorney, asked the following instructions, which were given by the court.

1st. That the facts necessary to be established in a case, may be established by circumstances alone.

2nd. In receiving the declarations of the prisoner, the jury ought to take the whole of them into consideration, and may believe that part, which charges the prisoner, and reject that which is in his favor.

3rd. The dying declarations of a person who has been killed, if made with regard to the circumstances which produced his death, are to be received with the same degree of credit, as the testimony of the deceased would be, if examined under oath as a witness.

4th. Deliberation and premeditation may be proved directly or be inferred from the circumstances connected with the killing; and malice may be established in the same way.

5th. If malice existed, it is sufficient, it is not necessary to prove the length of time it existed.

6th. All present at the time of committing an offence, are principals, although one only acts, if they are confederates and engaged in a common design, of which the offence is part.

7th. It is not necessary, in order to render a party an aider and abettor, that he should be actually present, it is sufficient, if he was in such a situation as to be able readily to come to the assistance of his companions, the knowledge of which was calculated to give additional confidence to them, and it makes no difference who strikes the blow, the blow of one is the blow of all. If the jury believe that Thomas Stuart, wilfully, deliberately and premeditatedly killed the boy, George Marr, and that Noel Green the defendant was present, aiding and assisting in the act, he is equally guilty as he who committed the act.

To the giving of these instructions the defendant objected, and excepted to the opinion of the court.

The defendant then asked among others, the following instructions, which the court refused.

1st. The jury must be satisfied from the evidence, that Noel Green, did wilfully, deliberately and premeditatedly, murder George Marr, or they must acquit the prisoner.

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2nd. In order to convict the prisoner, the jury must believe from the testimony, that the prisoner intended to kill at the time of killing, and that he intended to kill before the killing took place.

3rd. In order to convict the prisoner, the jury must believe from the testimony, that Stuart murdered George Marr, and that the prisoner was present, and wilfully, deliberately and premeditatedly aided in the commission of the murder. The court then gave the jury, the following instructions on the part of the defendant.

1st. The State must prove the charge as laid in the indictment or the jury must acquit.

2nd. If from the testimony, the jury have a reasonable doubt as to the guilt of the defendant, they ought to acquit.

3rd. If from the testimony, the jury believe that the accused and his party, were peaceably engaged about their own business, and were attacked by Morgan and his party Richard and George Marr, with such violence and surprise, and with deadly weapons to murder them or to do them some great personal injury, and there being immediate danger of such designs being accomplished, then they had a right to use such force as was necessary to repel the assailants, if death ensued then such killing was justifiable, and the jury must acquit.

4th. If the jury should believe from the testimony, that the prisoner went with Stuart without any intention on his part to commit a felony, and Stuart killed Marr, without the consent and aid of the prisoner, then they must acquit the prisoner. That presumption to justify the conclusion of guilt must be reasonable and flow necessarily from facts proved in the case. To which opinion and decision of the court, the defendant excepts.

The jury found the prisoner Noel Green guilty of murder in the second degree, and assigned his punishment to ten years imprisonment in the State Penitentiary.

The defendant, thereupon, moved the court to set aside the verdict, and grant him a new trial, for the following reasons, (viz.)

1st. The court erred in refusing a postponement of the case, on the affidavit of the accused.

2nd. The court misdirected the jury as to the law of the case.

3rd. The finding of the jury is against the evidence.

4th. The finding of the jury is against the law, as applicable to the case.

5th. The finding of the jury is against the weight of testimony.

6th. The jury from the law and testimony in the case should have ac-

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quitted the prisoner. Which motion the court overruled. The defendant excepted to the opinion of the court, prayed for an appeal, which was allowed him, and brings his case to this court.

From the record and proceedings of the court below, it will be necessary for this court to review the action of the circuit court in overruling the defendant's motion, to postpone the trial for some other day, during the same term of the court. Also the overruling the defendant's objection to the testimony, describing the wounds on the bodies of William Morgan and Richard Marr, their situation on the field of battle, when they were found.

The motion to postpone the trial unto some other day in court, is one addressed to the sound discretion of the court, and unless we find that the court has exercised this discretion oppressively or unsoundly and indiscreetly, we will not interfere with its action. The business before the court, the great number of witnesses and venire men in attendancy, are all to have their consideration, in granting such indulgence. The affidavit of the prisoner shows no grounds for the postponement. The testimony taken down by the committing and examining justice, is not evidence for the State, or prisoner, on his trial upon the indictment; it may have been important for the prisoner to have been able to hand his counsel the testimony, thus taken down as the means of enabling him the better to understand the transaction, and to make preparation for the defence on the trial, but not to use it as evidence before the jury. In this case, it is probable, his counsel did not need it, or he would have made enquiry for it sooner, and taken steps to have obtained it, or at least would have informed his client of its importance. We find no error therefore, in the court below, in refusing to postpone this trial for some other day at the same term. Nor do we perceive any error in permitting the witnesses to testify in regard to the wounds on the bodies of Morgan and Richard Marr. This whole affair may have been considered as the same transaction—different scenes making up the awful tragedy. It was well then to let the whole appear before the jury.

We will next consider the instructions given by the court for the State. Also those refused on the part of the defendant, as well as those given for the defendant.

We find nothing incorrect, nothing illegal in the instructions given for the State, they contain the law, so far as relates to transactions of this character. The instructions which the court refused to give for the defendant as above set forth, are not the law, and the court properly refused them, they are calculated to mislead the jury, and do not contain the

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law applicable to this case, or to the facts as detailed in evidence in this case.

The instructions which the court gave for the defendant were proper, and are what the law of the case warrants; and more especially do the 3rd and 4th instructions for the defendant, put his case before the jury in a point of view as favorable to the prisoner as the law arising from the testimony given before them will warrant. We consider the court went far enough for the prisoner. He has no cause to complain of the action of the court. We find no error, therefore, in giving or refusing to give instructions. The action of the court, therefore, in overruling the motion for a new trial, was correct, and its judgment is affirmed.

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Where an answer is responsive to the allegations in the bill, it must stand as proof of the facts stated in it, until contradicted by two witnesses, or by one witness and strong corroborating circumstances.

APPEAL FROM ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

The plaintiff in error was also complainant in the court below, and filed his bill alleging in substance, that one Amos Lovering in May, 1845, conveyed to complainant a valuable tract of land in St. Louis county, containing over 600 acres. That in June, 1843, Lovering being then the owner of the lands, conveyed the same to John C. Rust and A. Meir, in trust to secure to Jacob Flousch, the payment of two promissory notes of Lovering, each for the sum of \$175, payable 6 and 12 months from date. That these notes, together with the deed of trust, were assigned by Flousch to the defendant Musick, who agreed with Lovering to wait 60 days for the money from the date of the transfer to Musick. That Lovering having failed to pay the money within 60 days, Musick caused the land to be advertised for sale under the trust deed, fraudulently representing to Lovering that his only object in selling the land was to place the title in Musick, so that he could borrow upon the land as much as Lovering owed him. That he knew where he could borrow the money on the land, and if Lovering would allow him to buy it in at the trust sale, he would permit Lovering to redeem it at his convenience, and pledged himself to take no advantage of Lovering, from having the legal title in him. That Musick, at the time, deliberately intended to perpetrate a fraud by purchasing in the lands for a trifle, and then refusing to permit the redemption. That Lovering fell into the snare, and

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permitted the land to be sold, relying on Musick's promise to allow him to redeem. That the sale accordingly took place on 22d February, 1845, at 3 o'clock in the afternoon. That relying upon his right to redeem, Lovering made no effort to raise the money, and the whole tract was struck off to Musick for \$200. That neither Musick nor Lovering was present at the sale, and the land was bid in for Musick by the auctioneer at \$200, which was the only bid made. That no one was present at the sale but one of the trustees and the auctioneer, and that Musick had instructed the auctioneer to bid in the land for him. That the land was worth at least \$4000. That the sale was made at an unusual hour, and on a day generally kept as a holiday. That the advertisement was not in conformity to the trust deed. That it described the debt as due to the trustees, and not Flousch or Musick, whose names do not appear in the advertisement at all; that it wrongly describes the land, and that the advertisement is vague, uncertain, and not intelligible, and in no respect such as the deed required. That on the day of sale Lovering came to the city to look after his interest, but met Musick in the afternoon by whom he was assured that he need not attend the sale, that he, Musick, would buy in the land, and pledged himself in the most solemn manner that Lovering might redeem it. That Musick, after the sale caused the trustees to convey it to him, notwithstanding he had promised Lovering that no conveyance should be made until the terms of redemption were more explicitly agreed upon. That after the sale, Musick never denied Lovering's right to redeem, but on the contrary always admitted it, until about the time that Lovering was about to convey the land to the complainant, when Lovering and complainant called upon Musick, and offered to redeem by paying the entire debt and interest due to Musick, with all costs, and a suitable compensation for his trouble, when for the first time, Musick denied Lovering's right to redeem, and claimed the land as his own.

The complainant avers that he is ready and willing to pay Musick all that is due to him, and prays that the deed to Musick be held to be fraudulent, and that the same be set aside and complainant permitted to redeem. Musick, in his answer, admits the sale to complainant, but requires the production of the deed. He admits also the execution of the deed of trust, and the notes to Flousch, and the assignment from Flousch to himself; also the sale under the trust deed, and the purchase of the land by him at the trust sale, and the conveyance from the trustees to him. But he denies expressly that before or at the time of the sale, there was any agreement for redemption, or that he purchased the land with any such understanding. He admits, however, that *after* the sale, he voluntarily agreed with Lovering that if he would pay the debt, interests and costs, within 45 days, he would relinquish the title acquired by him at the sale. That at the time of the sale he did not want the land, but only to get the money due to him. That he told Belt, the auctioneer, to bid in the land for him, unless some one else bid more than the debt and costs, but not to bid in the land for him at more than the debts and costs. That Lovering failed to redeem within the 45 days, and he then concluded to keep the land himself; admits that afterwards that complainant and Lovering called upon him and offered to redeem, and that he refused to permit them to do so, but denies that they actually tendered the money; admits that he purchased the land for \$200; denies that he agreed that the trustees should not convey until he and Lovering had agreed upon terms for the redemption.

Says that Col. Chambers claimed the whole tract, and that the title to one-sixth was outstanding in one of the heirs of Hart, the original grantee; that Lovering had offered to sell the choice parts of the tract at \$5 per acre, without being able to effect sales at that price, but does not otherwise deny that the tract was worth \$4000 at the date of the sale. Lovering and the trustees were also made defendants. Lovering answered, setting out the facts in substance as they are stated in the bill. The trustees failed to answer, and the bill was taken as confessed against them. In the progress of the cause, the complainant, by an amended bill, charged that Musick and others, under his authority, were committing waste upon the premises, and obtained an injunction to restrain waste. But as this proceeding does not touch the merits of the case, it need not be further noticed.

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Upon the final hearing, the court dismissed the complainant's bill with costs. Complainant filed his motion for a rehearing which was overruled, and he has appealed to this court.

In the progress of the cause, the complainant obtained leave to take the deposition of the defendant Lovering, (see page 49 and 50 of the transcript) subject to all legal exceptions. The deposition was taken, and fully sustains all the material allegations of the bill. The complainant claims to have fully established in proof all the allegations of the bill touching the agreement for redemption, the subsequent offer to redeem, the refusal by Musick, the inadequacy of the price, the suspicious circumstances attending the sale, &c. (See the depositions of Lovering and (Peterson, page 69 and 71) the testimony of Belt, page 52, and Dogget, page 55.) The defendant contends that the proof sustains the answer and refutes the bill. See reports of testimony, page 51. The defendant introduced testimony with a view to impeach the credibility of Lovering and Peterson. See deposition of Chambers and testimony of Blair and Whitesides. The complainant then introduced evidence in rebuttal in support of their credibility. See testimony of Flagg, Tiffany, Henley, Fisher, Thornburg, Templeton and Morrow.

CROCKETT for plaintiff.

1st. That the sale to Musick was void. 1st. Because the advertisement does not describe the debt as due to Musick, but to the trustees. 2nd. Because it does not properly and truly describe the land. 3rd. Because it is vague, uncertain and confused, and contains no intelligible description of the debt, the parties or the property to be sold. The rule in such cases is that the trustee must strictly pursue the terms of the deed as to time, terms and mode of sale. 4 Alabama R. 433; 1 Peters R. 145; 4 Porter's (Alabama) R. 330; 1 Mo. R. 520; 10 Mo. R. 75.

2nd. That according to the weight of testimony in the cause, Musick obtained an unconscious and fraudulent advantage over Lovering, by holding out to him the delusive idea that he might redeem the land. He assured Lovering before the sale, that he would take no advantage of him; that he would purchase in the land and allow Lovering to redeem it. See deposition of Lovering and of Peterson, and Musick's letter to Lovering, page 47, of record.

3rd. That the sale to Musick may fairly be presumed to be fraudulent, and a court of equity will so regard it; because, 1st, of the gross inadequacy of the price. None of the witnesses value the land at less than \$3000. Musick purchased it for \$200. 2nd. The time and manner of the sale, at a late hour in the afternoon, no bidders being present, except an occasional passenger along the street, Musick himself not being present, nor Lovering, and there being but one bid made, and that by the auctioneer on behalf of Musick, are all circumstances of strong suspicion against the fairness of the transaction. Tirman vs. Wilson, 6 John. Ch. R. 416; 4 Cranch, 403, 18 John. R. 362; 3 Blackford's R. 376; 6 Wend. 522.

4th. Upon the whole proof, it must be conceded that before and at the time of the sale, it was agreed between Lovering and Musick, that *some* time should be allowed for redemption. If so, and if Lovering failed to redeem within the time stipulated, nevertheless a court of equity will not regard time as of the essence of the contract, but will treat it as in the nature of a penalty, and permit the redemption within any reasonable time. Watts vs. Watts, 11 Mo. R. 547; 1 Fonblanque Eq. 395, 6, 7, 151; Gower vs. Saltmarsh, 11 Mo. R. 271; 1 Maddox Chy. 28, 30-1-2; 2 Munford R. 71; 5 Munford R. 495; Hepbeme vs. Auld, 5 Cranch, 262; 6 Munford R. 78, 79; Brazier vs. Grady, 6 Wheat. 207; 2 Pierre Williams, 66; Getchell vs. Jewett, 4 Greenlf. 350; 1 Pow. Mortz. 379, a; Leggett vs. Edwards, Hopk. 530; 2d 391, a nee; Dumond vs. Sharts, 2 Paize, 182; Longworth vs. Taylor, 1 McLean, 395; Fletcher vs. Wilson, Sneides and Marshall Chy. R. 376.

5th. That although the general rule is that mere inadequacy of price, except in a very gross case, would not of itself be sufficient to set aside a sale; yet if it be connected with other cir-

circumstances, which show that the party was so oppressed that he was willing to submit to very hard terms, this will show a command over him, which amounts to fraud. In this case the price was so grossly inadequate as to render the transaction fraudulent on its face and connected with the other facts, establishes a clear case of fraud and oppression, against which the court should relieve. *Holmes vs. Fresh*, 9 Mo. R. 201.

SPALDING for defendant.

Upon a purchase and deed at sheriff's or other sale, an after agreement that the execution debtor may *redeem* or re-purchase within a specified time, is a *conditional sale*, and not in nature of a mortgage; and if the time expires without redemption, there is no equity remaining, and the right of redemption is gone. 4 Marsh. Rep. 47, 54; 7 Cranch. 218; 3 J. J. Marshall, 355; 4 Miss. Rep. 412, 13, 14, 15; Coote on Mortgages, 38, 39, (16 law libr. 17;) 2 Edwards Chy. Rep. 138, affirmed, 6 Paige, 480. The case 7 Miss. Rep. 327, was not like this. There the deed was, *on its face*, doubtful whether mortgage or not. Here, the deed is absolute, and the presumption is *against* the existence of any right to redeem; and burden is on complainant to show it *against* the *face and shape* of the instrument.

9 Miss. Rep. 201. That understanding of one of the parties does not make an absolute deed a mortgage.

2nd. Inadequacy of price is not ground of redemption in this case. 1 Story's Equity, sec. 244, 245; 9 Miss. Rep. 201.

3rd. There is no deficiency or irregularity in the advertisement of the sale under the trust deed such as makes the sale void or the land redeemable. 10 Miss. Rep. 77, *Stine vs. Wilkson*.

In the present case the advertisement was published tri-weekly and daily, in the same paper, during the whole time; and it was a country property. 4 Porter, 321, *Wiswall vs. Ross*, that advertisement under deed of trust need not specify the amount of the debt.

RYLAND, Judge, delivered the opinion of the court.

From the above statement it will be seen that both complainant and defendants contend, that the facts in testimony support each one's own side of this controversy. It becomes the duty of this court, therefore, to look carefully into the evidence and to determine for which side, the same preponderates.

I shall not take any notice of the insufficiency of the advertisements: it was very awkwardly drawn up: for a considerable portion of the deed of trust, was copied into it and published: which might well have been left out. I am not willing to reverse the decree of the court below by reason of any superfluous matter in the advertisement. It contains enough to give notice of what was going to be done in the premises, and indeed it appears from the evidence that it was known in the neighborhood in which the land was situated, that the same was to be sold, and that the day and place were known, previous to the sale's taking place.

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The answer of Musick is responsive to material facts alledged in the bill. This answer denies all fraudulent representations on his part, to procure any advantage of Lovering.

It shows a desire to indulge Lovering, and also an indisposition on the part of Musick to purchase the land.

It was natural for Musick to wish to make his debt and I am induced to think from all the evidence in the case that there was nothing wrong, nothing fraudulent or unfair in the means taken to enforce the payment of this money. The land was sold at the court house door in the city of St. Louis, on 22nd day of February, and was sold within the hours fixed by law for sales of real estate under execution. True it is, that the account given by Lovering of this transaction and of Musick's promises, and representations to him, does not agree with Musick's statement; and if Musick and Lovering must, the one or the other, be considered by me as the less worthy of credence, I must be candid and assign to Mr. Lovering that unenviable position.

Mr. Belt, the auctioneer, and witness in this case, satisfies me, of the correctness of Musick's answer. He states, that Musick gave him instructions, not to bid off the land to him if any other person would bid for it, the amount of his debt. This proves Musick's assertion, that he did not want the land, that all he wanted was his money.

We find Musick after the sale and purchase of the land by him, still giving time to Lovering to redeem the land, by paying the debt and interest.

Lovering still neglects or is still unable to redeem it, and Musick at length determines to hold the land and have nothing more to do with Lovering about it. There is nothing illegal or inequitable in this. He surely was not bound to extend this indulgence unlimitedly—or until Lovering should wish it no longer. I deem it unnecessary to recite the evidence in this case. Some of the witnesses for the complainant appear under a shade upon their credibility; and I am unwilling to overthrow the answer of the defendant, Musick, by any such testimony.

After an examination therefore of all the facts in proof in this case, I can find nothing requiring this court to disturb the decree of the court below.

My brother judges concurring herein, the decree of the circuit court, dismissing the complainant's bill, is affirmed with costs.

THE CITY OF ST. LOUIS vs. THOMAS ALLEN.

1. The 17th section of the 7th article of the charter of St. Louis, approved February 15, 1841, was continued in force by the act of Feb. 8, 1843.
2. The act of 1841, enlarging the corporate limits of the city of St. Louis, is constitutional.

ERROR TO ST. LOUIS CIRCUIT COURT.

STATEMENT OF THE CASE.

The defendant in error filed his bill of equity at the November term 1846, of the St. Louis circuit court, against the city of St. Louis, plaintiff in error, to restrain the said city, its officers and agents from selling certain lands for taxes, assessed therein by said city, and praying for general relief, &c.

The bill sets forth the locality and description of the lands and property, and the rights and interests therein of the defendant in error, that said lands and property were wholly without the city limits, prior to the passage of the act of incorporation of said city, approved February 15, 1841. The 17th sec. art. 7, of said last named act, is as follows :

"Sec. 17. The common council shall within twelve months from the passage of this act, cause to be graded and Macadamised the carriage way of Broadway, south seventh, Washington avenue and Market streets, twenty-five feet wide from the boundaries of the city established by this act, to the nearest point macadamised within the present limits of the city, and until such carriage ways aforesaid are made and completed, the lots and grounds beyond the present limits of the city shall not be taxed for city purposes, more than one sixteenth of one per cent."

All which allegations are admitted by the answer of the city.

The bill further alleges that another act of incorporation of said city was granted, approved, February 8, 1843, which last named act extended the boundaries of the city so as to include the whole of the lands and property upon which the tax complained of was assessed; that the last named act was passed by the General Assembly without the consent of complainant or his grantor: That the city levied a tax for city purposes on said lands and improvements for the years 1843 and 1844, of seven-eighths of one per cent. on the assessed value thereof; also a tax on the same and for same purposes, for the years 1845 and 1846, of one per cent. on the assessed value thereof; that the complainant, before said lands and property were advertised for sale, by the comptroller of the city, for non-payment of said taxes, caused a tender of the one sixteenth of one per cent. of the assessed value of said property for the years above mentioned, to be made to the collector of taxes for the city, which tender was refused by the city; that subsequent to such tender, the comptroller of the city advertised the said lands for sale for the delinquent and unpaid taxes assessed for the years aforesaid; all of which allegations are admitted by the answer of the city.

The bill further alleges that the city, prior to levying the said taxes of seven-eighths of one and of one per cent. aforesaid, had not performed the condition or requirements of sec. 17, art. 7, of the act of incorporation, approved Feb. 15, 1841, upon the performance of which condition depended the power of the city to levy a greater tax on said lands (if taxable at all by the city) than one sixteenth of one per cent.; that a part of the taxes for the non payment of which the said lands were advertised for sale, were assessed on other property; that the acts of incorporation of 1841 and 1843, extending the boundaries of the city, and including within such boundaries the said lands of complainant against his will, and without the prior or sub-

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sequent assent thereto of himself or his grantor, all unconstitutional and void; that the 17th section of article 7, of the act of 1841, was continued in force by the *exception* contained in the 24th section of article 7, of the act of 1843, which last named section is as follows:

"Sec. 24. All acts and parts of acts contrary to or inconsistent with the provisions of this act, or within the purview thereof, except the 17th section, of the act entitled, an act to amend an act to incorporate the city of St. Louis, approved 8th Feb. 1839, are hereby repealed."

The answer of the city denies that the condition or requirements of sec. 17, art. 7, of the act of 1841, had not been fulfilled, and performed before the said taxes were assessed, and alleges that said condition was fully performed by the city. The answer denies that any part of the tax for the nonpayment of which the said lands were advertised to be sold by the comptroller, were assessed on other property than said lands; the answer denies that the acts of 1841 and 1843, extending the boundaries &c. of the city, are unconstitutional or void; the answer denies that the 17th sec. of art. 7 of the act of 1841 was continued in force by the exception contained in the 24th sec. art. 7 of the act of 1843, and asserts that the said exception is void for uncertainty; and that sec. 17, art. 7, was repealed by the last named act; the answer insists that the duty to grade and macadamize the streets mentioned in the 17th sec. art. 7, of the act of 1841, was not a condition precedent to the exercise of the right and power to levy a tax on the said lands of seven-eighths, and of one per cent. on the assessed value thereof, because said sec. 17 is inconsistent with other parts of said act, impossible to be fulfilled, unintelligible and void for uncertainty.

To the answer of the defendant, the complainant filed his replication.

At the April term of said court, the cause was heard on bill, answer, replication and proof.

On the part of the complainant, the following evidence was offered, viz: tax bills of the city, and to the effect that a tax of seven-eighths of one per cent. on the assessed value of the lands therein mentioned, was levied by the city for the year 1843, upon the following property, (the lands &c. being the same in the complainant's bill mentioned) viz:

75½ acres and improvements, valued at	\$57,300
1½ " " " " "	750
10 Slaves	3,000
3 Horses \$90, & 3 cattle, &c.	205
	<hr/>
	\$61,255

Tax $\frac{7}{8}$ per cent.	\$535 93
1 Dog tax, \$1, 1 poll tax 50cts.	1 50
Int. from 1st. July 1843, to 1st. July 1846, 3 yrs.	96 66

Total, \$634 14

Also a similar bill for a tax of seven-eighths of one per cent. on the assessed value of the same property, *mutatis mutandis*, for the year 1844; also a similar bill for a tax of one per cent. on the assessed value of the same property *mutatis mutandis*, for the year 1845; also a similar bill for a tax of one per cent. on the assessed value of the same property *mutatis mutandis*, for the year 1846.

The complainant also read in evidence from the *Republican newspaper*, printed in said city, the advertisement in which the lands in question were advertised for sale by the comptroller of said city, Robert Simpson, for the non-payment of the said taxes assessed on said lands as aforesaid by the city, for city purposes for the years 1843, 1844, 1845 and 1846, which sale, according to said advertisement, was to have taken place at the court house in said city on the 30th day of November, 1846.

The complainant also proved that at the head of Washington avenue, about 300 feet east of the western limits of the city, (as it was then incorporated) there is a cross street 30 or 40 feet wide, which is paved from the head of Washington avenue to Christy street, which last

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named street is paved out westward to the city limits; that said cross street was opened about 15 years ago, but not paved until 4 or 5 years ago, under the charter of 1841. That Washington avenue was opened east of said cross street, under the charter of 1841.

The complainant also proved that Lafayette street, in *Sou'ard's addition*, was laid out by the proprietors before the extension of the city limits; that the distance from there to the south boundary of the city is a half or three quarters of a mile; that in 1841 there was no paving on 7th street south of Market street; at that time 7th street extended south to Hickory street, and thence it coincided with Market street in Soulard's addition, and run on south to Lafayette street. The complainant also produced in evidence a map of the city published by *Hutawa*, which by agreement may be used and referred to in this court.

On the part of the defendant, a letter from the city engineer to Wm Russell (under whom complainant derives title) in regard to paving 7th street and opening same, vide record, page 48 and following, dated May 31st, 1842, and Russell's reply thereto, dated June 3rd, 1842, with his deed relinquishing the right of way to the city and the public over a part of south 7th street, were read in evidence.

The defendant produced and read in evidence various ordinances and parts of ordinances of the city, "printed and published in book form, and purporting to be so printed and published by authority of the corporation," (and which by agreement are to be read in this court,) as follows: An ordinance entitled "a condensed ordinance in relation to streets and other highways," approved November 24, 1835. This ordinance establishes and directs the opening of all the streets named in complainant's bill as the city was then incorporated, and extending said streets to the out limits of the city. Ordinance No. 845, entitled an ordinance to establish, open, grade and macadamize certain streets therein named, approved October 9th, 1841.

This ordinance extends Broadway one hundred feet in width to the northern limits of the city according to its boundaries at that time. Also Market street eighty feet wide to the western limits; also Washington avenue eighty feet to western limits; and also south seventh street 60 feet wide to southern limits. And the fifth section of this ordinance directs the city engineer (who is a *public* officer, and recognized as such by the city charter of 1841,) to cause the said streets "to be surveyed, levelled, located and opened to their full width," &c.; also by the same ordinance, the city engineer is directed to grade and macadamize the said streets, "according to the city charter." Several other ordinances, supplemental and amendatory, adopted during the years 1841 and 1842, and which made further provision for the grading and macadamizing of said streets, and directing and making the duty of city officers to carry same into effect, were also read in evidence.

The defendant also read in evidence ordinance No. 1174, entitled "an ordinance providing for assessment and collection of the revenue and taxes of the city and for other purposes," approved September 5th, 1842.

This ordinance provides for the appointment of assessors, and makes it their duty to commence assessing property in their respective districts on the first day of March, 1843, and on the same day for each year thereafter, and make return of their assessment on or before the first day of July in each year. Vide sec. 9. The same ordinance provides for the levying of a dog and poll tax.

Sect. 3, art. II of same ordinance, prescribes the powers and duties of the collectors of the revenue and taxes of the city, and directs that whenever any tax shall remain unpaid, and sufficient goods and chattels and effects cannot be found to satisfy the same, the real estate and property on which such tax is assessed, be sold, &c., after giving public notice, &c.

The defendant also gave in evidence ordinance No. 1184, entitled "an ordinance declaring the per centum to be collected on the tax list of the city for the year 1843, approved June 30, 1843, which levied a tax of 7-8ths of one per cent. on the taxable property within the city limits. Also ordinance No. 1342, approved June 19, 1844, levying a tax of 7-8ths of one per cent. on the taxable property within the city for 1844.

Also ordinance No. 1490, entitled "an ordinance establishing the per centum to be collec-

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ted on real and personal property, approved June 24, 1845, which levied a tax of one per centum on the taxable property for the year 1845.

Also ordinance No. 165), approved June 17th, 1846, which in like manner levied a tax of one per cent. on the taxable property for the year 1846.

No other proofs were heard in the case, and the court below decreed for the complainant, and made the injunction perpetual, restraining the defendant from selling the lands in the complainant's bill mentioned for said taxes, and from collecting said taxes in any other way, &c., &c.

The case comes into this court by writ of error, and the following errors are assigned :

- 1st. That the circuit court erred in finding for complainant.
- 2nd. That said court erred in making the injunction perpetual.
- 3rd. That the court erred in rendering said decree for plaintiff.

TODD & KRUM for plaintiff in error.

1. The several acts of the general assembly of Missouri, incorporating and extending the city of St. Louis mentioned in complainant's bill, are constitutional and valid laws, and that it was competent and lawful for the city to exercise all the powers and jurisdiction which it did exercise in this case, over the lands of the complainant within the corporate limits of the city. 9 Mo. Rep. 507; 9 Cranch. 52; 4 Wheat. 518; 2 Kent. 206; 1 Tucker's Com. 162.

2. The act of February 8th, 1843, repealed all prior acts of incorporation, and the exception in the last named act is void for uncertainty. "D. Warris on statutes," pages, 694, 699; 7 vol. law lib., as to rules of construction.

3. Even admitting that sec. 17, art 7 of the act of 1841, was not repealed by the act of 1843, yet the complainant failed to show that the condition specified in sec. 17, art. 7, of the act of 1841, had not been performed by the city before the tax or taxes complained of were assessed, and the burthen of proving that said condition had not been performed, rests upon the complainant. 2 Daniels Chan. 939, note (1); ib. 991, and note 1; 1 Greenleaf Ev. sec. 74, 78; Grisly's Eq. Ev. 238, 289.

4. The city of St. Louis being a municipal corporation, its officers are public officers, so declared by its charter, and whatever duty is by law imposed on such officers, it will be presumed that they performed such duty until the contrary is made to appear. 1 Phil. Ev. 195, C. & H. note 296; 14 J. R. 182.

5. Whether or not the act of 1843, repealed the 17th sec. art. 7, of the act of 1841, yet the allegations and proofs on the part of the city, show, that all the requirements of the last named act, had been performed, before the tax or taxes complained of were assessed. The defendant's answer being responded to, the bill must be taken as true, unless disproved by two witnesses, or one witness and circumstances. 1 Greenleaf sec. 260; 1 Page Rep. 209.

6. The taxes for the years 1843, 1844, 1845 and 1846, were lawfully assessed upon the real estate and property in question. Vide city charters and ordinances, before referred to.

7. Whether said taxes were lawfully assessed or not, the complainants allegation and proofs, do not make a case to entitle him to the relief sought, nor to any relief in a court of equity. The case made does not show that the sale would have thrown a cloud upon complainant's title, and besides he had a full and adequate remedy at law. 1 Hal. 352; 12 Mo. 132; 9 Page 388; 10 ib. 539; 17 Mass. 461; 12 Pick 206; 10 Conn. 127; 6 ib. 223.

8. In any view of the case the decree of the circuit court is erroneous, because the city is restrained from collecting the whole tax or any part thereof for the years 1843, 1844, 1845 and 1846; whereas the complainant concedes (and such is undoubtedly the law) that the city was authorized to collect a tax upon the property in question of one-sixteenth of one per cent upon the assessed value thereof.

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GEYER for defendant.

I The seventeenth section of the seventh article of the act of 15th Feb. 1841, entitled "an act to amend an act to incorporate the city of St. Louis, approved 8th Feb. 1839," was not repealed by the act of the 8th February 1843, entitled an act to reduce the law incorporating the city of St. Louis and the several acts amendatory thereof into one act and to amend the same. That section is not contrary to, or inconsistent with any of the provisions of the last mentioned act and was evidently intended to be excepted from the repealing clause.

The law does not favor repeals by implication, nor is such repeal inferred unless the repugnancy is quite plain and unavoidable. 6 Bac. A. tit. Statute D; *Planters' Bank vs. State*, 2d Smedes & M. 628; *Sheel vs. Commonwealth*, 6 Watts & S.

A statute repealing all former acts within its purview does not repeal the provisions of former laws, as to cases not provided for by the repealing statute. *Payne vs. Conner*, 3 Bibb, 180.

Where two statutes can stand together the latter will not be construed to repeal the former. *Ludlow vs. Johnson*, 3 Ham. 553; *Morris vs. Del. & Schuylkill Canal*, 4 Watts & S. 461; *Loker vs. Brookline*, 13 Pick. 342, 348; *Kenney vs. Malloy*, 3d Ala. 626; *Bower vs. Lease*, 5 Hill 221; *Commonwealth Bank vs. Chambers*, 8 Smedes & M. 9; *Bruce vs. Schuyler*, 4 Gel. 221; *Davies vs. Fairbairn*, 3d How'd. U. S. 636; *Beals vs. Hale*, 4 How'd. U. S. 57. It is not sufficient to establish that subsequent laws cover some or even all the cases provided for by the former law, there must be a positive repugnancy between the provisions of the new laws and the old. *Wood vs. United States*, 16 Peters 362. Where the provisions of a precedent statute are not incompatible with those of a subsequent one in *pari materia*, it is not repealed by construction. *Brown vs. Miller*, 4 J. J. Marshall, 474.

The act of Feb. 1841, contains three sections numbered 17, one in article second, which was re-enacted in terms, as section 17, art. 2d in the act of 1843. The other two being in articles 4 and 7, are not re-enacted but neither of them is contrary to or inconsistent with any of the provisions of the act of 1843, and are therefore not repealed by the repealing clause of the latter act.

The seventeenth section of the 7th article of the act of 1841, is in the nature of a contract or condition not provided for by the act of 1843 and therefore not within its purview. If the acceptance of the act of 1841 is assumed, that acceptance must be understood to comprehend the terms and conditions, contained in that act beneficial to the inhabitants, namely that the real estate, without the old limits should not be taxed beyond the rate prescribed, until the condition should be performed. The repeal of that section would impair the contract and therefore it should not be supposed to have been the intention of the legislature to repeal it. *Den. vs. Robinson*, 2d Southard 680; *McMecham vs. Major & c.* 2 Har. & J. 41; *Atwater vs. Woodbridge*, 6 Conn. 223; *Osborne vs. Humphrey*, 7 do 335; *Landon vs. Letchfield*, 11 do 251; *Hardy vs. Wather*, 7 Pick. 110; *New Jersey vs. Wilson*, 7 Crand. 164.

II. The power of the city of St. Louis to levy taxes on real estate, beyond the limits of the city as it stood incorporated prior to 1841, depended upon a condition precedent, prescribed by the seventeenth section of the act of February 1841. That condition has not been performed, and consequently the attempt to levy taxes on that description of property, exceeding one-sixteenth of one per cent. is unlawful.

III. The acts of 1841 and 1843 are of no validity whatever, so far at least as they purport to affect persons and property and not within the limits of the city as it stood incorporated before 1841, because they assume to subject such property and persons to the control of a corporation against the will of the inhabitants, and without any acceptance of the act of incorporation on their part.

In England though the King has power to create a corporation he cannot impose the constitution upon his subjects without their consent. It is as necessary to show the acceptance of the charter by those to whom it is offered as that it was granted by the crown. Willock on

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corporations 30; Rex. vs. Passmore, 3 T. R. 240; Rex. vs. Amory, 1 T. R. 586; Rex. vs. Askew, 4 Bur. 2199.

The doctrine that the state legislature may pass any law not expressly prohibited, though sometimes asserted, cannot be maintained upon principle. There is nothing in the letter of the constitution to prevent the passage of laws to transfer property from one person to another or to impair vested rights except in cases of contract, yet such laws are not regarded as within the scope of legislative power—because against common right. Williams vs. Register, Cooke 214; Hoke vs. Henderson, 4th Dev. 1; Owens vs. Rain, 5 Hay. 106; Bowman vs. Middleton, 1 Bay 252; S. P. Harper, 200; Story 2, in Wilkenn vs. Leland, 2 Peters, 658; Jackson vs. Frost, 5 Cow. 346; Wally vs. Kennedy, 2 Yerg. 554; Jackson vs. Lyan, 9 Cow. 664; Stackpole vs. Heeby, 16 Mass. 36; Proprietors of Kennebec purchase vs. Larabee, 2 Greenl. 275; Hampshire vs. Franklin, 16 Mass. 76; Windham vs. Portland, 4 Mass. 390; Taylor vs. Porter & Ford, 4th Hill 140; Ham vs. Claws, 1 Bay 98.

IV. The power to levy taxes and regulate the disposition of real estate without the consent of the owners is a high prerogative, which if it may be delegated by the legislature to a corporation, must be delegated as an independent and express power, it cannot be raised by implication and cannot be exercised where the power is doubtful. Ellis vs. Marshall, 2 Mass. R. 269; Beatty vs. Knowler, 4 Peters 152; Gosler vs. Corporation Georgetown, 6 Wheat. 597; Collier vs. Doby, 6 Ham. 395; Berger vs. Clarkson, 1 Halstead 352.

NAPTON, J., delivered the opinion of the court.

The first question I shall examine in this case, is whether the 17th section of the 7th article of the charter of St. Louis, approved Feb. 15, 1841, was continued in force by the act Feb. 8, 1843.

The 24th section of the last article of the last named act contained this provision. "All acts and parts of acts, contrary to and inconsistent with the provisions of this act, or within the purview thereof, except the seventeenth section of the act entitled 'an act to amend an act to incorporate the city of St. Louis, approved 8th, Feb. 1839,' are hereby repealed."

The act of 1841, which is here referred to by its title, contains seven articles and *three sections numbered seventeen*. That the legislature intended to re-enact or continue in force one of these three sections is unquestionable, and if we can, with reasonable certainty, ascertain which of the three was intended, there can be no doubt of the duty of the court to carry out the intention of the legislature. If, however, it is impossible to ascertain, with reasonable certainty, which of these sections was designed, the exception must fall, and the continuance in force of the 17th section of the 7th article of the charter of 1841, must then depend upon the question, whether it is inconsistent with, or contradictory to, or within the purview of the act of 1843.

The first section numbered 17 in the act of 1841 occurs in the 2d article, and is re-enacted word for word in the corresponding section of the corresponding article of the act of 1843. That section is clearly

out of the question. The second numbered 17 is to be found in the 4th article of the act of 1841, and is as follows: "Whenever there shall be a tie in the election of city officers, the judges of election shall certify the same to the mayor, who shall issue his proclamation &c." This section is omitted in the corresponding article of the act of 1843 and the subject of a tie in the election of these city officers is not provided for. The only other 17th section in the act of 1841 occurs in the 7th article, and it is the one which forms the basis of the complainants bill. It is as follows: "The common council shall within twelve months from the passage of this act, cause to be graded and macadamized, the carriage way of Broadway, south seventh, Washington avenue, and Market streets, twenty five feet wide, from the boundaries of the city established by this act, to the nearest point macadamized within the present limits of the city, and *until such carriage ways aforesaid are made and completed, the lots and grounds beyond the present limits of the city shall not be taxed for city purposes, more than one sixteenth of one per cent.*"

We are satisfied that the last named section in the 17th section referred to in the act of 1843, and this opinion is not derived from mere conjecture, but as it seems to us, is attended with as much certainty as is requisite to authorize the courts to carry out the intentions of the legislature in the construction of their acts.

In the first place, it is to be observed, that the section of the act of 1843 which makes the provision or reservation which is the subject of enquiry, is found in the last article of the act, under the head of miscellaneous provisions, and the 17th section of the act of 1841, which provides for the grading and paving of certain streets as a condition precedent to the exercise of the taxing powers of the city beyond a certain limit over the citizens of the district annexed by that charter, is found in the corresponding article of the act of 1841, having the same caption. The 17th section of article 4, in the act of 1841 related to a subject which had been legislated on in the corresponding article of the act of 1843. It would have been a strange and singular circumstance, for the legislature in 1843, to have passed by the subject of a tie in an election, when legislating on the subject in the 4th article, and then at the conclusion of the law, and under the head of miscellaneous provisions, to insert a section, the object of which was to regulate a matter about which they had devoted a previous chapter or article of the law. Such a circuitous mode of legislating could never have occurred to any one, and if the 17th section of the 4th article of the act of 1841 had been accidentally omitted, and its retention or re-enactment was con-

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sidered important, it was most natural and easy to have caused its insertion in the 4th article of the act of 1843. This is a trivial circumstance, it is admitted, but it is one among others which point conclusively to the real intent of the legislature.

But again, the seventeenth section of the 4th article of the act of 1841 is an unimportant one ; it is a provision for a contingency, which rarely happens and which is therefore very frequently left unprovided for in laws which relate to popular elections, and if the contingency should happen, no inconvenience or but little is likely to result from the want of a special provision. General principles of law will point out the course which must be taken in such contingences.

There is however a third reason which must still more forcibly influence the judgment, in the conclusion, that the seventeenth section of the 7th article, and not the 17th section of the 4th article, was intended. The former is obviously in the nature of a stipulation or contract, in which the new corporators are deeply interested. The duties imposed by that section upon the corporation are manifestly the consideration which induces these citizens to consent to have their property taxed beyond their previous liabilities. At all events, it is the consideration which induces the legislature to authorize the enlargement of the corporate limits and embrace these citizens within those limits, whether with or without their consent. No court would presume the repeal of such a law. It cannot be repealed by mere implication. Statute, affecting the rights of private individuals must be construed strictly. A blunder of a clerk is not to deprive citizens of their rights solemnly guaranteed by express legislative enactments. Courts of justice have long since ceased to be hampered by such clerical blunders, where they can distinctly and with sufficient moral certainty perceive the real intent of the legislature.

We think there is this moral certainty here. When we see the great importance and solemn character of the 17th section of the 7th article in the act of 1841 affecting as it does individual rights and corporate responsibility, when we further compare it, with the trivial and entirely unimportant character of the other section numbered seventeen in the same act, and when we also consider the positions which these sections occupy, it is not a mere matter of conjecture as to which of the two was intended.

The grounds of the present complaint are, that the city has not complied with the obligations imposed upon it by this seventeenth section of the charter of 1841, but has nevertheless proceeded to levy and collect

taxes upon the complainant and others who were brought into the corporation by this charter, greatly exceeding the limit fixed by this section. The city, in its answer, admits the levy of the taxes, but denies their failure to comply with the 17th section and asserts that the provision has been substantially complied with, and refers to the ordinances supposed to carry out the obligations imposed by this provision of the charter. There is no proof on either side, but, for the purpose of this case, it will be sufficient to take the facts, as stated in the answer, to be true.

Ordinance No. 845, is claimed to be a substantial compliance with section 17, art. 7 of the act of 1841. That ordinance is as follows: s. 4 declares, "south seventh street extended southwardly shall be 30 feet in width on each side of a centre line, commencing at the intersection of seventh and Market streets, and thence southwardly running in a direct line to the intersection of the centre of Soulard and seventh as now established, thence in a direct line to the intersection of the centre lines of Park avenue, as laid out by an act of the legislature, and south Market street of Soulard's second addition to the city, and thence parrallel to Carondelet avenue, and with the centre line of said south Market street, as laid out in said addition, to Lafayette street in said addition, and thence eastwardly on said Lafayette street to Carondelet avenue, and south on Carondelet avenue, and with the same to the southern boundary of the city, and west of the arsenal wall—which said *south Market street* and *Lafayette street* as aforesaid, and *Carondelet avenue* from the intersection of Lafayette street, therewith, to the southern limits of the city, and west of the arsenal wall—*shall be known* by the name and style of *south seventh street*. *Provided, however*, that all persons owning land or lots on either side of said south seventh street from the centre of Soulard and seventh streets as now established, southwardly to the south limits of the city, shall relinquish to the city of St. Louis all right and title to so much of said lands or lots, as shall be required for opening and extending said south seventh street to the southern limits of the city, &c."

Other provisions are made in this ordinance for having this south seventh street thus laid out as above, and the other streets named in the 17th section of the charter of 1841, graded and paved under the directions of the city engineer, and upon the conditions specified in the above section 4; and the answer asserts that this ordinance has been in fact, carried into effect, and the streets therein designated, have been graded and paved.

The seventeenth section of the 7th article of the charter of 1841, ex-

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pressly provided that the lands and lots beyond the limits of the city as they were defined previously to that charter, should not be taxed over the one-sixteenth of one per cent., *until* four carriage ways or streets were graded and paved from the exterior limits as fixed by that charter to the nearest points within the old limits already graded and paved. The general course of these streets was indicated by calling them by the names of certain streets, already existing within the former limits of the city. They were four principal or leading thoroughfares, leading from different directions; two of them, Market street and Washington avenue coming in from the west at lines nearly parallel to each other; and the other two leading, one from the north, and the other from the south.

We do not perceive any justice or propriety in giving this seventeenth section a strict literal interpretation. Such an interpretation, it is obvious from a glance at the map of the city, would thwart the intent of the legislature and be productive of real injury to the parties who were intended to be benefitted. A fair and bona fide compliance is all that is requisite. The motive which prompted the introduction of this provision into the charter, is quite apparent. The owners of tracts of land, at that time used as farms, or at all events, not laid off into city lots, were to be brought within the limits of the corporation and subjected to its taxing powers. Some equivalent for this important addition to the revenue of the city was thought proper and just. The equivalent determined on, was the construction of these four roads or rather paved streets, running in different directions through the lands thus about to be subjected to taxation. The construction of these streets would embrace the value of the lands over which they were built.

The city was then bound to comply fairly, and in good faith with this provision, before undertaking to increase the tax over one sixteenth of one per cent. But these streets, designated as south seventh, Broadway, Washington avenue and Market street, had no existence even on paper at the time this charter was passed, beyond the former limits of the city. How then are we to fix upon the exact course? Who is to determine this matter? An examination of the map or plat of the city, shows that the continuance of south seventh street in a direct line from the former limits of the city would carry that street to the river, and it would never reach the southern limits of the city, under the charter of 1843. This was a matter, as we think, within the sound discretion of the corporate authorities. The exact course of the streets was not provided for in the 17th section, and it was for the city authorities, to carry out by their general powers the spirit and intent of the section, as nearly as practi-

cable. Nor do we think it important that the continuation of these old streets through the new territory, should be known or called by the same names with the former streets. This was a matter of fancy not affecting the rights of any one. It matters not, that the common council have thought proper to abolish the names of south Market street and Lafayette street and Carondelet avenue, and designate them all as south seventh street; if these streets constituted a natural, convenient and proper continuation of the seventh street, which was confined to the old limits. We can see no propriety in interfering with these matters. The newly added citizens, for whose benefit the 17th section was enacted, are entitled to a continuous paved street, of a specified width, from the southern limits of the city to the point where seventh street is paved within the old limits; a street having the general course of seventh street as before known; but not necessarily a straight line or without angles in it. It should, undoubtedly, conform to the general plans of the city. But it was known at the time of the passage of this act, that various additions had already been made on the southern end of the city, and the new street must, therefore, conform as near as practicable to the squares and streets laid off in these additions.

Again, the ordinance No. 845, contained a proviso, that the owners of lots and lands adjoining seventh street should relinquish to the city so much ground as was requisite for constructing said street. This relinquishment of course the owners were not bound to make. Undoubtedly it is in the power of the corporate authorities, generally to cause streets to be opened on the best terms they can make, and to decline the improvement, if the lot holders will not accede to the proposed terms. Such a course may be generally a prudent and safe course for the interest of the city. But when they assume an obligation, as they did by the charter of 1841, to open and macadamize certain specified streets and their rights of taxation depend upon the fulfilment of this obligation, they cannot impose upon the owners of the lands adjacent to such contemplated streets the additional duty of relinquishing a portion of their land without compensation, and upon the refusal of such proprietors to part with their land without compensation, relieve themselves from the obligation they have assumed. The streets must be opened and paved before they can exercise the power of taxation. This is their contract and it must be performed. The law has invested them with ample powers to proceed with the opening and paving of the streets, whether the proprietors of the grounds adjacent think proper to give them the land or not. The sixth article declares that whenever it may be necessary to

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take private property for opening, widening or altering public streets, the corporation shall make a just compensation to the person whose property is taken, and if the amount of such compensation cannot be agreed on, the mayor shall cause the same to be ascertained by a jury. The corporation of St. Louis had ample power then to cause all the streets specified in the 17th section of the 7th article of the charter of 1841 to be constructed, and it was the duty of the corporation to have these streets made as directed by that section, without reference to the consent or refusal of the proprietors to give up portions of their land without compensation. However, the proviso of this ordinance, 845, is not important in this case, if in fact the streets were laid off and macadamized as directed by the charter.

There can be no serious objections to the general course of south seventh street as laid out by ordinance 845, from the point where it leaves the city limits until it reaches Lafayette street. It is true, that at its intersection with Park avenue, it diverges a little more southwardly than its previous course does, and becomes identified with a street in Soulard's second addition previously known as south market—but this was rendered necessary, or at least proper by the plan of Soulard's addition. Upon reaching Lafayette street, it is turned at right angles to its former course, and identified with this cross street, until it reaches Carondelet avenue, thus falling back one square east of its previous course. This appears somewhat singular, and is thus explained in the answer. "The section of the charter relating to streets, in its strictest signification, was carried out as to all the streets but south seventh street." That street was carried as far as it could be in the new limits, by continuing southwardly its general direction, as such direction existed in the old limits; but when the northern line of what is called the "little prairie field lots," was nearly reached, the city then not being able to agree with the proprietors of said field lots so as to continue the same direction through the same, deflected south seventh street eastwardly one block to what was called Carondelet avenue, and graded and paved Carondelet avenue to the southern limits, calling the whole street seventh street, &c." If we are to take the avenue as indicating the true and sole reason for this singular "deflexion" of seventh street, from the south to an east course, until it fell into the public highway of Carondelet avenue, we must regard it as very insufficient apology. That the city authorities and the proprietors of the little prairie field lots were not able to agree, may have arisen from the fact, that the agents of the city insisted upon running the street through their lots without giving them any compensa-

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tion, as the ordinance 845 seems to have contemplated. If this were so, it was no reason for discontinuing the general direction of the street. As we have shown before, the city had the power to cause the street to be run through the land of private citizens and a mode was provided for agreeing upon the compensation. It may be that the further extension of this street in its previous course would have passed through the land of the complainant and thereby greatly enhanced its value. It was his right to insist upon a *bona fide* extension, provided no inseparable obstacles presented themselves. There certainly might be such as would well have justified the city even in giving this street this zigzag form, but as none such have been alleged, we will not presume them.

The power of the city of St. Louis to sell lands and lots for non-payment of taxes, was considered and decided affirmatively in the case of Russell vs. St. Louis. We admit, that the power to levy and *collect* taxes, when given to a corporation, does not necessarily imply a power to sell lands for the non-payment of the taxes thereon. There are other modes of collecting a tax than by an immediate sale of the land. Suit may be brought; judgment obtained and execution issued as for other debts. But it must also be admitted that the ordinary method of collecting taxes on land and the only one resorted to by the State herself, is by a direct sale of the property taxed. The words "levy and collect" therefore, though not of necessity implying a power of sale, and consequently, not to be conceded to a municipal corporation by mere implication, are yet capable of receiving such a construction, and when the legislature in the same charter insert other provisions distinctly and unequivocally assuming the existence of such a power, we regard such subsequent assumption or admission as a legislative interpretation of the previous language.

The constitutional power of the legislature to pass the act of 1841, and of 1843, extending the limits of the former corporation of St. Louis so as to embrace a portion of our citizens within the corporate limits without their consent, was determined affirmatively in the case of Russell vs. the city, heretofore referred to. The question has again been discussed at great length and with great ability. I shall not undertake an examination of all the positions assumed, on behalf of the complainant, much less a refutation of them. In most of the general propositions advanced I fully concur, but I cannot accede to the conclusions which have been drawn from them.

The whole argument of the learned counsel for the complainant may be resolved into a single proposition, and that proposition is a denial of the power of the legislature to create a municipal corporation, except

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by the consent of the persons or a majority of them, included within such corporation. If the right to create the corporation in the first instance, without reference to the wishes of the citizens therein embraced be admitted, the right to enlarge its limits subsequently, so as to bring within its jurisdiction other citizens, without their consent, must follow as a necessary consequence. There is no conceivable abuse to which the latter power is liable that may not with equal propriety be predicated of the former. It is impossible to distinguish them and they must both stand or fall together.

This proposition may be still further narrowed. It must resolve itself into a strict prohibition or denial of power, on the part of our legislature, to create a municipal corporation, without the consent of every man within its limits. It will not do to admit that a majority may consent, and that such consent will give the power. Such an admission concedes the unqualified power. If a citizen of this State cannot be forced into such a corporation without his consent—if this right of his is protected by the constitution or those great fundamental principles which are incidental to every free government, whether expressly guaranteed by written constitutions or not, then the consent of every other man in the State cannot and ought not to deprive him of this right. Constitutions are made to protect the rights of minorities and of individuals. Majorities can protect themselves; the consent or acquiescence of a majority cannot confer a power, expressly or impliedly withheld by the constitution. It would be a poor protection to individual rights if our constitution left them at the mercy of a majority.

If it be conceded then, that a majority of the people living in the proposed addition to the city of St. Louis in 1841, could by their assent sanction the charter which the legislature in that year passed, the corporation as I think yields the power absolutely without qualification. If the proposition however, be established, that the legislature have not the power or the right to create a corporation of this kind, without the consent of the corporators, that consent must proceed from every individual to be affected, and the assent of a bare majority will not confer the power. And this is doubtless a correct proposition when applied to private corporations, or any kind of corporations not established for the mere municipal organization of the people of the State. It is no doubt usual in every case of this kind for legislative action to await the wishes of a majority of those who are to be affected by it. The legislature have no inducement to impose corporate governments upon her citizens, or any portion of them, when the citizens concerned do

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not desire it. This, however, is obviously a matter of expediency; a circumstance which has and ought to have great weight in determining the passage of such laws, but not a circumstance which touches the question of power.

The plaintiff is then bound to maintain that the right of the legislature to create these city or town corporations is dependant upon the will of every citizen who is proposed to be embraced within their limits. I am unable to perceive any material distinction between legislation of this character and that which has been and continues to be exercised in the organization of counties. I see no inconvenience, no hardship or abuse which can occur in one class of legislation, which is not equally liable to happen in the other. The general purposes of the legislature are the same. In the organization of counties, it is true, that the tribunals entrusted with their local administration, do not have any police powers, and there is more uniformity in the extent of the power of taxation which is given to them by the legislature. But this results from a uniformity of interest and situation, which does not exist in reference to the various towns and cities scattered throughout the State. The latter vary so much in population, in wealth, commercial importance and in many other respects, that a uniform system of government would not be practicable or desirable. It is not to be denied, that in either class of legislation, to which we have alluded, great abuses will sometimes occur—but the correction of these abuses is as readily attained at the ballot box, as it would be by subjecting it to judicial revision. A citizen, or a number of citizens, may be substracted from a county, free from debt, having no taxation for county purposes, and added to an adjacent one, whose debts are heavy, and whose taxing powers are exercised to the utmost extent allowed by law, and this too without consulting their wishes. It is done every day. Perhaps a majority of the people thus annexed to an adjacent or thrown into a new county by the division of an old one, may have petitioned the legislature for this change—but this is no relief to the out-voted minority or the individual who deems himself oppressed and vexed by the change. Must we then to prevent such occasional hardships deny the power entirely?

It must be borne in mind that these corporations, whether established over cities, towns or counties or townships (where such incorporated subdivisions exist) are never entrusted, and can never be entrusted, with any legislative power inconsistent or conflicting with the general laws of the land, or derogatory to those rights, either of persons or property, which the constitution and the general laws guarantee. They

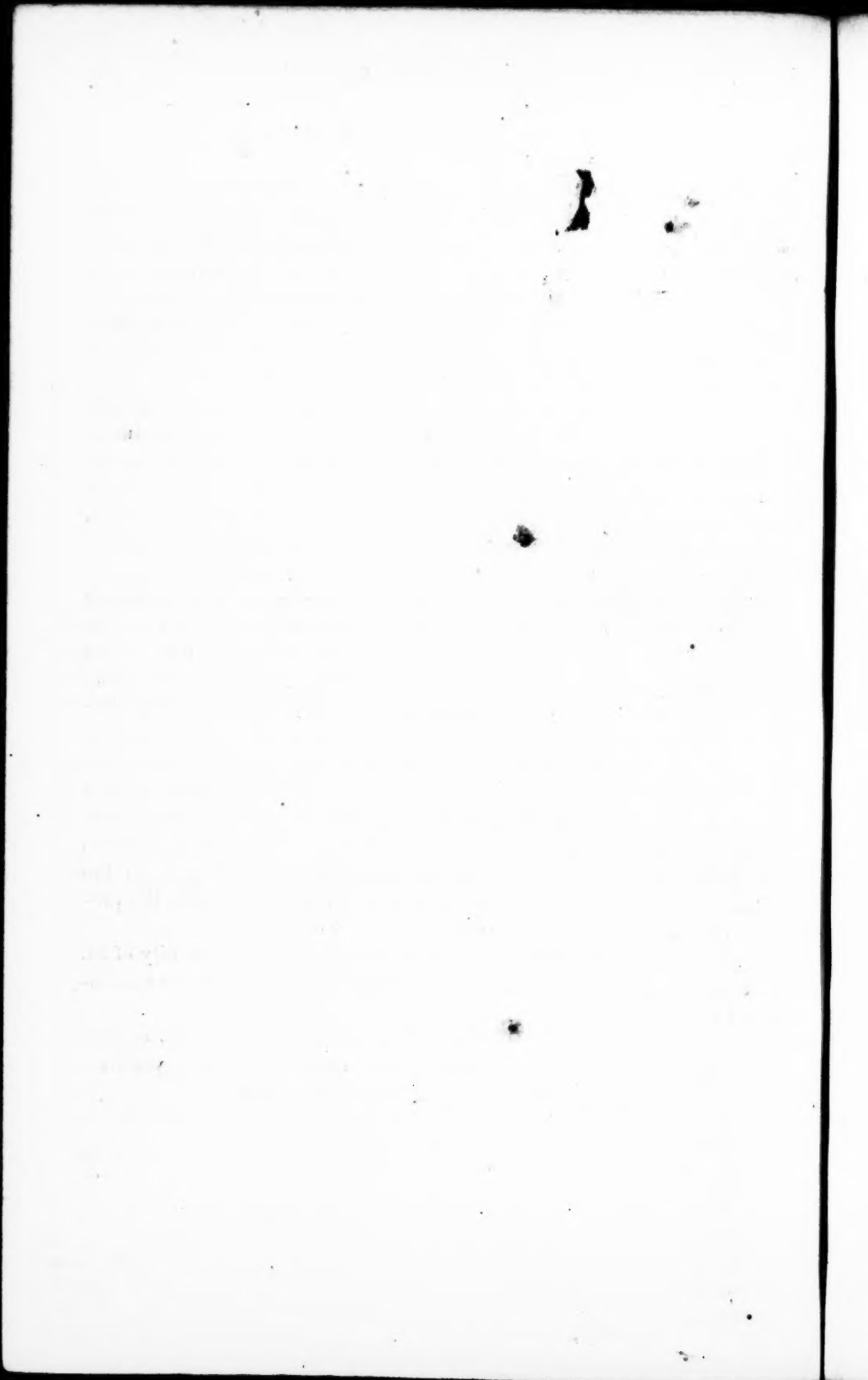
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are strictly subordinate to the general laws, and merely created to carry out the purposes of those laws, with more certainty and efficiency. They may be, and sometimes are entrusted with powers which properly appertain to private corporations, and in such matters, their character as mere municipal corporations ceases. The corporation of St. Louis might be entrusted with powers to borrow money and with the funds thus procured, enter upon some great scheme of improvement supposed to be beneficial to the city and the State. It must then, to this extent and for this purpose, be like any other incorporated company established for making roads, digging canals or engaging in manufactures. I should doubt the power of the legislature to compel any man to become a share-holder in such a company without his consent. That is, however, not a question to be decided here. It is not pretended, that the corporation of St. Louis have been authorized to engage or have engaged in undertakings foreign to their duties as a mere municipal corporation.

I do not consider the English cases applicable here. The violations of city charters complained of in that kingdom proceeded from the crown. In the contests between the parliament and the crown, under the Stuarts, the incorporated cities and towns of England were found mostly on the side of the parliament, and the right of the King to alter or abolish the charters and impose new ones was strenuously resisted by the parliament and ultimately repudiated by the courts. But it was never doubted in England that the parliament—that the three estates could abolish or alter at pleasure the city charters, and although we do not pretend that our legislature possesses the theoretical omnipotence of the British parliament, its powers are certainly more analogous to the actual and acknowledged practical powers of that body than to the prerogatives exercised by the crown.

I conclude then that the act of 1841, for incorporating the city of St. Louis, was a legitimate exercise of legislative power, and in this conclusion I understand my colleagues to concur.

Judge BIRCH: Without feeling called upon to express any opinion here, respecting the legislative competency to pass the act in question, I concur in the judgment agreed upon by my colleagues.



SUPREME COURT.

JULY TERM, 1850.

GOLDEN vs. THE STATE.

1. Upon an application for a change of venue in a criminal case, reasonable notice must be given previously to the application; the reasonableness of the notice must be construed with reference to the existing parties.
2. The general law providing for a change of venue in criminal cases, does not apply to causes pending against persons undergoing sentence of imprisonment in the Penitentiary.

ERROR to Cole Circuit Court.

PARSONS, for Plaintiff in error.

The circuit court erred in refusing to grant the application of the plaintiff in error for a change of venue. See Rev. Code, 1845; Practice and Proceedings in criminal cases—art iv. secs. 17, 19 and 20.

This statute is general, and guarantees the same rights to convicts as to other persons.

Although the statute regulating the Penitentiary requires the convicts to be kept within the walls, there is no law which deprives them of the right of trial by an unprejudiced jury.

When there are two statutes apparently repugnant to each other, the courts will construe them in *favoram vite*.

As to the question of notice, see *Read vs. State*, 11 Mo. Rep.

ROBARDS, Attorney General, for the State.

The only point presented by the record in this case, is the refusal of the circuit court to remove the cause from the county by change of venue.

1. There was no notice of the application as required by the 20th sec. of the 5th art. of the act concerning practice in criminal cases. Digest 1845, page 874.

2. There is no provision made by law by which a convict can be removed from the Penitentiary to a distant court during the term for which he is sentenced. Upon a change of venue being ordered, it becomes the duty of the court to order the removal of the body of the defendant to the jail of the county into which the cause is to be removed, according to the 29th sec. of the 5th art. of the act concerning criminal practice, Digest, page 876. This cannot be done in the trial of a convict. Every felon in the State Penitentiary could commit a

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felony, and be removed from the prison by taking a change of venue to another county—a thing never contemplated by the law making power. As no provision has been made, by which a convict can be removed, or by which he can take a case from Cole to any other county, it is presumable that it never was intended that he should have that right. If there be any hardship in this, it is not referable to the judiciary, but to the law making power. The right to take a cause from one county to another, is a right or privilege derived solely from the legislative provisions, none of which are applicable to convicts in the Penitentiary. Inasmuch as the right has never been extended to them by the Legislature, their honesty and loyalty is not such as to commend them very particularly to the judiciary, at least more than to protect them in their diminished rights, and admeasure to them the full penalties contemplated by law. It may be that the deprivation of this right to a change of venue, when criminally charged, like a deprivation of personal liberty, is intended as a part of the punishment of a felon. His sentence deprives him of many rights. This is one. He is deemed in law civilly dead, and it was never intended that he should be the partaker of legislative rights and privileges, granted to citizens, except when specially provided.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff in error was indicted by the grand jury of Cole county, at the August term of the circuit court, in the year 1849, for making his escape from the Penitentiary, in which he was then undergoing a punishment by confinement for a term less than life, to wit: for eight years, for a felony before that time committed by him.

Before the trial was had in this case, the defendant below was brought into court by the lessees of the Penitentiary, in obedience to an order of said court. Thereupon the court appointed counsel for the prisoner to assist him in making his defence.

The defendant then moved the court for a change of venue, and filed his petition and affidavit; the petition setting forth the reason of the motion, viz: the prejudice of the minds of the inhabitants of said Cole county so much against the defendant as to render it impossible for him to have a fair and impartial trial of said case. No notice was given of this application to change the venue previously to the motion in court.

The court overruled the petition to change the venue. The defendant then plead not guilty to the indictment. A trial was had; the jury found the defendant guilty, and assessed his punishment to two years imprisonment in the Penitentiary.

The defendant thereupon moved for a new trial, setting forth, among other reasons, the refusal of the court to change the venue. This motion was overruled; the defendant excepted, and brings the case to this court by writ of error.

The only point relied on for a reversal of the judgment of the court below, is the refusal of that court to change the venue.

The Attorney General, for the defendant in error, contends that the judgment of the court below should be affirmed for two reasons. *First,*

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the failure to give "the reasonable previous notice" of the application for the change of venue, as required by the law. See Practice and Proceedings in criminal cases, article v, sec. 20, Digest of 1845; and, *Secondly*, the omission of our statute to provide for change of venue in cases of indictments against convicts in the Penitentiary.

With regard to the want of notice, the plaintiff in error relies upon the authority of the case of *Reed vs. the State*, 11 Mo. Rep. 379, and upon the second point, relies upon the generality of the provisions of the statute concerning change of venue in criminal cases.

I am not satisfied that the notice arising alone from the act of filing the petition and affidavit is sufficient. The law contemplates a reasonable previous notice, and the case of *Reed vs. the State*, above referred to, undertakes to state what would be considered reasonable previous notice, under a certain state of facts. In that case notice had been given. "The notice is dated on the day of filing the petition." The court, in their opinion, say "the term *reasonable*, as here used, must be construed with reference to the existing facts. If the defendant had possessed a knowledge of the judge's prejudice for days and weeks prior to his application for a change, then perhaps he should have given the prosecuting attorney notice before the morning of the day when the cause was called for trial.

There is a distinction between the case of *Reed vs. the State* and the one now before us. In that case the court say that *Reed* gave his notice "at the earliest possible period"; as soon as he knew of the existence of the fact upon which he sought to change the venue.

In this case no notice ever was given, other than the motion to change the venue in open court, and the filing the petition and affidavit.

As to the second point. By reference to the statute authorizing change of venue in criminal cases, I find that "any criminal cause pending in any circuit court, may be removed by order of said court, or the Judge thereof, to the circuit court of any other county," &c., &c. See *Prac. and Proceed. crim. cases*—art. v. Sec. 17, Digest of 1845. "Any criminal cause" are words very comprehensive, and unless there are other provisions limiting their operation, would include this cause now before us. Section 29 of the same article, makes it the duty of the court or judge granting the order of removal, whenever the defendant be in actual custody or confinement, to make also an order commanding the sheriff to remove the body of the defendant to the jail of the county into which the cause is removed. And the 30th sec. of the article requires the sheriff to obey this order without unnecessary delay.

Here, then, if the court should order a change of venue in a criminal

cause, pending against a person confined in the Penitentiary, to another county, it must also, at the same time, order the removal of the body of the defendant by the sheriff to the jail of the county to which the cause has been removed. This would materially affect the judgment heretofore given requiring the defendant's imprisonment in the Penitentiary. It is the duty of the sheriff to convey convicts for felonies to the Penitentiary, and the duty of the keeper of the Penitentiary to receive them and safely keep them. In certain cases, a convict may be brought out by habeas corpus to testify in our courts, but there is no law authorizing the courts or judges to command that the body of a convict should be taken from the confinement in the Penitentiary and carried to a county jail, and there imprisoned to await his trial, which may be postponed for a year or eighteen months or more. Convicts in the Penitentiary, during the term for which they were sentenced, suffer a suspension of all their civil rights. It may be that the Legislature, on purpose omitted to provide for a change of venue in criminal cases pending against convicts then in the Penitentiary. The law as it now exists, in my opinion, does not warrant the circuit court or judge thereof to change the venue in any cause pending against a person undergoing sentence of imprisonment in the Penitentiary. I have no doubt it never entered the minds of our legislators, when enacting the statute concerning a change of venue in criminal causes, that its provisions were designed to include convicts in our Penitentiary.

Were convicts permitted to change the venue in cases depending against them, and thereby have themselves taken from the State Prison and confined in the common and sometimes insecure county jails, there to await a trial, which could be postponed from term to term by the convict making out a suitable and proper cause, the whole term of imprisonment might in some cases be thus passed before the trial could be had. This would be inducement to the prisoners in the Penitentiary to commit crime in order that they might have it in their power to procure a change of venue, and a consequent deliverance from the Penitentiary.

The convicts are *civiliter mortuus* for the term of their sentence. To permit the oaths of such persons to authorize the courts to grant a change of venue, with the consequences that must now follow, was never in the contemplation of the law makers. They have, therefore, wisely refrained from legislating on this particular subject.

The counsel for the plaintiff in error invokes the principle of construing repugnant provisions of our statute in *favorem vitæ*. It is our duty to make such construction as would reconcile the various provisions

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if we can do so, if not, we must look at the reason and design of the various enactments, and carry out the object of the legislature.

Upon the whole of this case, we find no reason to interfere with the judgment of the court below; it is, therefore, affirmed.

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Where no bill of exceptions is preserved, and where the record does not show any exceptions taken by the plaintiff in error to the opinions or decisions of the circuit court upon motions made by him, the judgment must be affirmed.

ERROR to Dade Circuit Court.

ROBARDS, Attorney General, for the State.

1. The judgment of the circuit court should be affirmed, because there is no bill of exceptions in the case. *State vs. Fortune & Harman*, 10 Mo. Rep., 466; 10 Mo. Rep., 357.
2. The indictment is good. It alleges in clear and explicit language the partial destruction of a public school house, "built for the use of schools." This is sufficient to show that it was not his own. In fact, the face of the indictment shows, that the building damaged was not defendant's property; and he is liable under the first section of the act concerning "trespass."
3. The motion for a new trial was made too late, after the motion in arrest of judgment. 11 Mo. Rep., 116; *McComas vs. the State*.
4. As no bill of exceptions was preserved, containing the evidence and the motion for a new trial, the court should not consider the instruction; 10 Mo. Rep., 506, 357.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff in error was indicted in the circuit court of Dade county, for willfully, maliciously and unlawfully doing an injury to a public school house, by throwing down the chimney thereof, in said county.

The plaintiff in error moved the circuit court to quash the indictment, which motion the court overruled. He was then called upon to plead to the indictment; he refused to plead, and stood mute; thereupon the court ordered the plea of "not guilty" to be entered for him; a trial was had upon the issue made upon this plea, and the jury found the defendant guilty and assessed his punishment by a fine of ten dollars.

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The plaintiff in error, defendant below, then moved the court to arrest the judgment, which motion was overruled. He thereupon moved to set aside the verdict and grant him a new trial, which was also overruled. Thereupon he sues out his writ of error and brings the case to this court.

Upon inspecting the record of the proceedings in the circuit court, I find no bill of exceptions; nor does the record any where show, that any exceptions were taken by the defendant below to any opinion or decision of the court, upon any of the various motions made by the defendant.

This court, in the case of the State vs. Fortune & Harman, 10 Mo. Rep., 466, decided that where an indictment was quashed, on motion, and there was no bill of exceptions preserving the motion, the judgment must be affirmed. This decision materially operates on the case now before us. Here, no bill of exceptions preserves either the motion to quash, or the motion in arrest, or the motion for a new trial. No exception appears to be taken to any action of the court below. The evidence is not preserved. I cannot see, then, any ground for a new trial, even supposing the motion had been made in time, or in its proper order. See McComas vs. the State, 11 Mo. Rep., 116.

I have looked into the indictment in this case, and think it is sufficient to support the judgment of conviction upon it. It might well have been drawn with more technical skill; however, it is, in my opinion, sufficient, and I am not disposed to search for objections with a very critical eye, in order to reverse the judgment against one who has showed himself unmindful of the duty incumbent upon all our citizens, to preserve and protect the property and means devoted to so interesting and vitally important a subject as the education of our youth.

My brother judges concurring herein, the judgment below is affirmed.

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1. Upon a change of venue, the clerk of the court to which the cause was removed omitted to endorse upon the transcript, the time when it was filed in his office; the defendant appeared and continued the cause; at the next term the court directed the clerk to endorse upon the transcript, the time when it was filed. Held not sufficient cause for arresting the judgment of the court.

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2. The evidence of general bad character of a witness should not be confined to the single fact of want of veracity on oath.

APPEAL from Newton Circuit Court.

HENDRICK, for appellant.

This was an indictment for larceny, and upon the trial it appeared, that the colts charged to charged to have been stolen, came to the residence of the appellant without his knowledge, and when he was from home, and remained there some time at his stallion's stable, and the appellant's possession was not only not felonious, originally, but lawful; having taken them up as strays. It appears also from the evidence on the part of the State, that the conduct of the appellant was open and notorious, sufficiently so to give the real owner of the colts every opportunity to sue him in trespass. It is insisted by the appellant, that his original possession not being felonious, and his subsequent conduct amounting at most to nothing more than a trespass, he cannot be guilty of a larceny. To sustain this position, the appellant relies upon upon the principle, that if the original taking be not felonious, no subsequent act will make it felony. And also, that when the conduct of the prisoner was open and public, there can be no felony implied, but at most a trespass. The circuit court therefore erred in refusing to grant a new trial.

ROBARDS, Attorney General, for the State.

1. The first point presented in the record is the action of the circuit court in reference to the transcript from the Barry circuit court. At the September term, 1849, of the Barry circuit court, the defendant was indicted for larceny, and at the same term obtained a change of venue to the Newton circuit court. A correct transcript of the record was made out and filed with the clerk of the Newton circuit court in the same month. This transcript was not marked filed by the clerk at the time it was deposited in his office. At the September term of the Newton circuit court, upon the application of the defendant, the cause was continued. At the April term, 1850, after the jury was sworn, the attorney for the State asked that the clerk be permitted to endorse the transcript as filed, "*nunc pro tunc*," which was done after the court satisfied himself that it had been on file since the 30th day of October, 1849. The court did right. The endorsement by the clerk does not constitute the filing, but is *prima facie* evidence of the time of filing. This marking by the clerk avoids confusion and fixes the time in the first instance. If the clerk neglects to endorse the filing, it may be proved by other evidence. As no other objection was made to the record, this court will consider no other.

2. The second point is as to sufficiency of the indictment. It is strictly correct.

3. The weight of evidence is in favor of the verdict of the jury and should not be disturbed.

4. The court refused the defendant's counsel to ask the witnesses, who testified as to the character of Rachel Murdock, whether they had ever "heard any person speak of her general character when on oath before she gave evidence in this case." I know the rule of law is, that when a witness speaks of the character of another for truth, his means of knowledge and the facts upon which he found his opinion, may be enquired into. Three witnesses swore they knew her general character for truth, and that they would not believe her on oath. The defendant stated to A. Reed and A. Brown that the colts were McKinney's, and yet he proves by this witness, Murdock, that he did not know whose they were. She is positively contradicted by these two witnesses. But the refusal of the court to allow this question to be answered, could not affect the defendant's case. If the jury had believed every word she

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stated, it could not have changed their verdict. She proved his taking the colts, and attempted to prove facts which would remove the felonious intent fixed upon him by other witnesses; the facts failed to have this effect, but the jury had a right to determine whether they would take as true, her statement, or the evidence of three or four unimpeached witnesses.

5. The instructions given on behalf the State, are substantially correct. They present the case very properly before the jury.

6. Every instruction asked by the defendant and given was wrong, and if the verdict was against them, it is in accordance with the facts and the other instructions. The 3rd, 4th, 5th, 6th and 7th, are substantially the same. They all assert, in different language, that if the defendant did not conceive the felonious intent at the time he got the colts in possession, but only afterwards, that he is guilty only of a trespass. There is a rule of law, that when the original taking of goods is not "*animo furandi*," a subsequent conversion will not constitute it larceny; but this rule applies to cases where a person comes to possession of goods lawfully, such as, by bailment, by finding, as servant of another, by claim of supposed right. But the facts of this case show beyond a doubt, that the defendant never had possession of the property by consent of the owner, or by lawful authority. The owner never parted with his possession.

Roscoe on Crim. Evidence. 466; 4 Book of Blackstone's Com. page 179, note 3; Wheelers Crim. Cases, vol. 1, page 166, note *.

The first instruction is, that possession of stolen property does not raise such presumption of guilt as to require the defendant to prove his good character to rebut it. Possession of stolen property is such presumption of guilt as to require the defendant to rebut it; whether he rebuts it by proof of good character, or otherwise depends upon the circumstances of his particular case.

The second instruction to the jury is, that the defendant is not bound to prove his good character, until it is attacked by the State. The very reverse of this is the law.

Roscoe Ev. 73. All this error is in favor of the defendant, and is no ground of complaint by him.

RYLAND, Judge, delivered the opinion of the court.

This was an indictment for grand larceny, found by the grand jury of Barry county, against the defendant, John Day, and one Jackson Ellis.

The defendant, Day, prayed for a change of venue, and it was ordered by the court, and the case was sent to Newton county. The transcript of the record and proceedings was delivered to the clerk of the Newton circuit court some time in the month of October, in the year 1849; but the clerk omitted to endorse on the transcript the day the same was filed with him.

At the first term of the Newton circuit court, which was held after the change of venue in this case, and which commenced on the 30th day of October, 1849, the defendant moved to have the case continued, which was done accordingly. At the next term of said court the case was called for trial.

The defendant stood mute, and refused to plead. The court directed the plea of not guilty to be entered, and a jury to be sworn and em-

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pannelled to try the issue. After the jury was sworn, the circuit attorney discovering that the clerk had omitted to endorse the time of the filing on the transcript of the record and proceedings had in this case in Barry circuit court, moved the court to permit the clerk to endorse the day of the filing of the same, now, for then. The court examined the deputy clerk as to the time when said transcript was placed in the clerk's office, and being satisfied that the same had been delivered to the clerk about the time mentioned above, directed the clerk to endorse the same by putting the time of filing thereon. This the defendant excepted to, and tendered his bill of exceptions, setting forth the substance of the above facts. This action of the circuit court is relied on as one of the reasons for reversing the judgment in this case.

The trial was had; the jury found the defendant guilty, and assessed his punishment to five years imprisonment in the State Penitentiary.

All the instructions asked for by the State, as well as all asked for by the defendant, were given to the jury. After verdict, the defendant moved for a new trial, assigning the following reasons, among others: "Because the defendant was tried on an indictment which never was properly in this court, previous to the entering of the plea and the swearing of the jury." "Because the court rejected evidence that ought to have been admitted."

The bill of exceptions shows, that after the State had closed her evidence in chief, the defendant read the deposition of one Rachel Murdock, and closed his defence. The State then introduced witnesses to impeach the credibility of the defendant's witness, Murdock, by stating her general character. William Curry, a witness, stated that he was acquainted with the general character of Rachel Murdock for truth and veracity; that it was bad; that from her general character he could not believe her on oath. Defendant then asked Curry, "If he had heard any person speak of her general character when on oath, before she gave evidence in this case, and if so, what did they say?"

To this question the State, by her attorney, objected; the court sustained the objection, and the defendant, excepted. This appears as the only objection made to any evidence given on the trial for either party, and was the only question which the court refused to permit to be answered.

The court overruled the motion for a new trial. The defendant then moved in arrest of judgment, assigning as reasons the act of the court in permitting the transcript of the record and proceedings to be marked filed, as before noticed, "that there was no sufficient indictment in this case, before the plea was entered and the jury sworn." "That there

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never was in this case any sufficient indictment properly in this court; and that the said indictment is informal, insufficient and uncertain."

The court overruled the motions for a new trial and in arrest of judgment. The defendant brings the case to this court by appeal.

The only grounds for our interference with the judgment of the circuit court relied upon, as appears from the record in this case, (there being no counsel in this court for the defendant,) are the acts of the court below, in directing the clerk to mark on the transcript the day when it was delivered to him, and the sustaining of the objection made by the circuit attorney to the question put by the defendant to witness, Curry, as above set forth.

We find nothing wrong or improper in the court ordering the clerk to mark the time on the transcript when it was filed. It was an act that could not probably operate to the injury of the defendant. It was marked as filed on the 30th day of October, 1849, the first day of the first term of Newton circuit court, to which the venue had been changed, after the order making such change; at which term and on which day, the defendant appeared and moved for a continuance, and filed therefor his affidavit. The case was continued. Now, what harm was done to the defendant, by the omission of the clerk to endorse the time on the transcript when it was first delivered to him? What effect could it have on the trial of the case before the jury? What influence on the defendant's privilege to summon witnesses, or to make preparation for trial? We can see no event arising from such omission, or from supplying it now, for then, that could have the least bearing on the trial. We, therefore, find nothing in this point.

As to the question which was asked of witness, Curry, it was not strictly legal, and might well have been overruled. We have regretted, however, to perceive such objections to questions which could not affect the case in any way.

In this case, it was to prove what other persons had said about the witness, Murdock's veracity on oath. We see it in the bill of exceptions, that the witnesses were asked on what they formed their opinion of her general bad character. We hold that the evidence of general bad character of a witness need not be confined to the single fact of want of veracity on oath. From the whole evidence, as preserved in the bill of exceptions, we think the defendant had the full benefit of the above question to witness, Curry, although the court refused to let the answer be made by witness.

The instructions given by the court for the defendant, were the most favorable that could have been given. The case was placed

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before that jury in the fairest point of view for the defendant. Indeed the State might complain of some of these instructions as stretching the law to too great a length for the defendant; but of this defendant cannot complain. The indictment we consider sufficient. We have examined the whole record and proceedings in this case, and find no error requiring the action of this court to correct.

Let the judgment, therefore, be affirmed.

FALLENSTEIN vs. BOOTHE.

1. Where the evidence before the jury is such that they might find a verdict for either the plaintiff or defendant, a new trial should not be granted.
2. The jury are the proper persons to estimate the value of character, and to assess the requisite or appropriate amount of damages for any injury thereto; and unless their estimate be an exorbitant one, or such an one as at first blush would appear the offspring of malice, or exceedingly improper bias on the part of the jury, it is improper to grant a new trial.
3. In actions of slander, the words spoken are to be construed according to their natural meaning and common acceptance. The old doctrine, that words spoken slanderously are to be taken in *mitiara censu*, has long since been abandoned.

Appeal from Howard Circuit Court.

STATEMENT OF THE CASE.

Boothe commenced this action in the Howard circuit court against Fallenstein, charging him with having spoken the slanderous words charged in the following count, to wit: "For that the said defendant, wickedly intending to injure the plaintiff heretofore, to wit, on the first day of May, 1849, in a certain discourse which he then had of and concerning the plaintiff, did, in the presence and hearing of divers persons, maliciously and falsely speak and publish of and concerning the plaintiff, the following false, scandalous and defamatory words; that is to say, he (meaning the plaintiff,) stole his note, he (meaning the plaintiff) stole his note and carried it off in his pocket—he (meaning the plaintiff,) stole his note and tore it up—he (meaning the plaintiff,) stole it—he (meaning the plaintiff,) stole my note—he (meaning the plaintiff,) stole my note and carried it off in his pocket—he (meaning the plaintiff,) stole my note and tore it up—he (meaning the plaintiff,) stole my note from me—he (meaning the plaintiff,) stole the note from me—he (meaning the plaintiff,) stole the note—he (meaning the plaintiff,) stole the note from me and carried it off in his pocket—he (meaning the plaintiff,) stole the note and carried it off,—he (meaning the plaintiff,) stole his note to me—he (meaning the plaintiff,) stole the note he had given me."

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The second count in the declaration is in the same form, except the speaking of the words is laid in the second person.

The declaration has the general conclusion. By means of the committing of which grievances by the said defendant, &c.

The defendant filed the general plea under the statute, and at the December term, 1849, upon the trial of the cause, plaintiff proved by one Peterson Parks, that in a conversation in the store of defendant between plaintiff and defendant, concerning a promissory note for \$1 92, which plaintiff had a short time before executed to defendant, defendant said "he had stolen his note;" that this was in reply to what plaintiff had said, that was in substance that he had given his note, and could not pay the account until he got his note.

Defendant proved by Mason and Bradley, who were both present at the interview about the note, that defendant did not speak the words as stated by Parks. That he said in substance, the note being gone, did not release plaintiff from the payment of the debt, and that the matter lay between Mason, his clerk, and defendant, and that he did not believe Mason took it, because he had the care of much more important papers all the time.

Upon this evidence, the cause being submitted without argument, the jury returned a verdict for plaintiff of one thousand dollars.

Motions for setting aside the verdict for a new trial, and also in arrest of judgment being overruled, Fallenstein has brought his case here by appeal.

CLARK & DAVIS, for appellant.

It is contended by appellant, that upon the face of the record, there is no cause of action stated. That the term "note," used in the court as being the thing stolen, is too uncertain and indefinite for a direct charge of slander. That being the case, there is no averment in the declaration, that by the use of these words, defendant intended to charge plaintiff with the commission of larceny or any other crime, or that he was so understood.

There is no allegation in the declaration, that any special or particular kind or description of note was meant by the words spoken, neither is there any innuendo used as to the application of the term note, nor is there any *colloquium* averred concerning a note of any kind. Starkie on Slander, (bottom page,) 304 to 312; 2 Pick. 320; 15 Wendell 232; 1 Chitty 437; 8 Mo. Rep. 512; 1 Chitty 429, 430, 431.

And if the declaration were sufficient to support the judgment after verdict, the damages were excessive, and under all the circumstances, a new trial ought to have been granted. The words spoken are as proved in the third person. That cannot be so; such things occur in draughting bills of exceptions inadvertently. The testimony of Parks is also to the effect that the conversation was in the store of the defendant, and when both parties were present, and this is also stated in the testimony of Mason and Bradley.

The speaking of the words, then, was upon an occasion and under circumstances which rebut the idea of malice. Plaintiff being asked for a small amount due him by defendant, required the note to be got before he would pay it, and that being gone under circumstances very peculiar, to say the least, defendant uttered the words to his face, in his own house, in the heat of blood, and the idea of previous malice is rebutted by all the facts that up to that time, plaintiff had been buying and dealing on credit in that store.

LEONARD & PREWITT, for appellee.

1. There is nothing in the case to warrant the interference of this court upon the ground of "excessive damages." Coleman vs. Southwick, 9 John. 45.

2. The words laid are actionable, and the declaration good even upon demurrer. Words are to be understood as the community understand them, and the old rule of understanding them in their mildest sense is abandoned. 1 Starkie on Slander, 45 side page, and 51, and cases there cited in note 19. Woolnoth vs. Meadows, 5 East. 463. Hagley vs. Hagley, 2

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Bailey 592. Davis vs. Johnson, 2 Bailey 579. Wiley vs. Campbell, 5 Mon. 396. 2 Binn. 34, Brown vs. Lamberton. Hume vs. Arrowsmith, 1 Bibb. Walton vs. Singleton, 7 Serg. & Rawl. 451. Andrews vs. Kossenheifer, 3 Serg. & Rawl. 254. Cornelius vs. Slyck, 21 Wend. 71. Rev. Stat. 45, page 360, § 37.

3. If it were not good on demurrer, here there has been a verdict, and after a verdict, the court will understand the words as the jury have, if they are capable of that interpretation. Beake vs. Oldham, 1 Cowper 278; 1 Starkie on Slander, side page, 50 and 79; Beers vs. Strong, Kirby (Conn.) Rep. 12; Dexter vs. Taber, 12 Johnson 239; 2 Binn. 34; Roberts vs. Camden, 9 East. 93; Welsh vs. Eakle, 7 J. J. Marshall, 424; Stokes vs. Stuckey, 1 McCord, 562; Morgan vs. Williams, 1 Strange 142.

4. There was ample evidence to warrant the verdict, and even if this court would have found the fact otherwise, when there is any evidence this court will not interfere.

RYLAND, Judge, delivered the opinion of the court.

This case was submitted to the jury by the parties below without argument. Many instructions were given by the court for both parties. No exceptions were saved to any act of the court below, in either rejecting testimony or in giving instructions. Every instruction which the defendant asked for was given by the court, and from an examination of these instructions, I am satisfied that the case was put fairly before the jury. The defendant has no cause to complain of the acts of the court before the finding of the verdict; nor did he complain.

After verdict, he moved for a new trial, assigning as reasons therefor, that the court improperly rejected evidence offered by the defendant—that the verdict is against evidence—that the damages found by the jury are excessive. This motion was overruled and excepted to. The record nowhere shows that any evidence was rejected by the court on either side. It also shows that there was evidence before the jury on which they might find a verdict for plaintiff or for the defendant either; and having found their verdict, the court did right to overrule the motion, so far as regards the two first reasons assigned.

As to the excessiveness of the damages, we cannot see anything requiring our interference on this point. The jury are the proper persons to estimate the value of character, and to assess the requisite or appropriate amount of damages for an injury thereto, and unless their estimate be an exorbitant one, or such an one as at first blush would appear the offspring of malice or exceeding improper bias on the part of a jury, the courts have invariably refused to correct the verdict, by granting a new trial.

We cannot therefore interfere on this ground. The circuit court before which the trial was had, appears satisfied with this verdict, and it is presumed that court was fully competent, after hearing all the evidence and seeing the witnesses and their manner of testifying, to come

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to a proper conclusion on this subject. Therefore, I conclude there was no sufficient ground to set aside the verdict, and grant a new trial.

Upon the motion to arrest, I am also of the opinion that the court below acted properly.

The old doctrine that words spoken slanderously are to be taken in *mitiori sensu*, has long since been abandoned. Words are now to be taken as the common understanding of mankind estimates them, and the jury now decide upon the fact as to what the defendants words do mean. The court will neither construe the words in their worst or most offensive sense, nor in their *mildest* sense. On this point the authorities cited by appellees counsel are plain and satisfactory; to which I will add one settled nearly two hundred years ago—the case of *Stevens vs. Ask*, Michælmass Term 1654; *Stiles Reports*, page 424.

After verdict the courts will understand the words as the jury have, if the words will bear such interpretation. Upon the whole of this case, then, we feel bound to affirm the judgment.

ASHLEY ET AL. VS. TURLEY AND FOUR OTHER CASES.

A claim to land by virtue of a Spanish grant and confirmation, described as follows: "30,000 arpents 60 miles above the Osage, on the south side of the Missouri river, in which quantity should be comprised, the river a La Mine, and also the salt springs which he designed to work," &c., is not sufficiently specific to bring it within the reservations of the act of Congress of February 15, 1811, so as to prevail against a New Madrid location. The claims reserved by the act of 1811, were such as had a fixed locality, or could be reduced to a certainty by a survey.

ERROR to Cooper Circuit Court.

STATEMENT OF THE CASE.

These five cases were actions of ejectment brought in the Circuit Court of Cooper county by the plaintiffs in error against the respective defendants. They are included in one statement, as the case on the part of the plaintiffs is the same in all, and on the part of the defendants there is no material difference in the defences set up in each case.

The plaintiffs claim title under Chouteau's Spanish grant of 30,000 arpents, confirmed by the act of Congress of the 4th of July, 1836. The defendants claim title under New Madrid locations, by virtue of the act of Congress of the 17th of February, 1815, and they produced New Madrid patents for all the locations except one, and this is the only difference in the defence in any of the cases.

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Upon the trial the plaintiff read in evidence—

1st A certified copy of the original Spanish grant of 30,000 arpents made to Pierre Chouteau by Carlos Debault Delassus, 20th Nov., 1799—certified to be a true copy of the original by the Recorder of land titles in the State of Missouri, together with a true translation of the same into the English language. This document consists of a petition by Chouteau for a grant of 30,000 arpents, on the south side of the Missouri river, sixty miles above the Osage river, so as to comprise in the quantity the river a La Mine, and a concession thereof by the said Delassus, which was registered by order of the Lieutenant Governor under the Spanish authorities, and was afterwards filed with the Recorder of Land Titles for the Territory of Louisiana.

2nd. The plaintiffs then read in evidence the proceedings had before the board of commissioners for the adjustment of private land claims in the State of Missouri, which commences with a notice by Chouteau to Frederick Bates, Recorder of Land Titles, on the 26th of May, 1808, of his concession as being on record in his office, and contain the action of the board of commissioners on his claim, ending with the decision of the board that the claim ought to be confirmed, together with the certificate of the Recorder of Land Titles at St. Louis, in the State of Missouri, that the said proceedings were a full and complete transcript of the documents, papers and proceedings had relating to the claim of Pierre Chouteau therein named, on file and of record in his office—that said claim was included in the transcript of favorable decisions, transmitted by the Recorder of Land Titles in the State of Missouri, and the two commissioners appointed with him to the commissioner of the General Land Office, under an act of Congress, entitled "An act for the final adjustment of private land claims in Missouri, approved 9th day of July, 1832;" and "An act supplemental thereto, approved 2d day of March, 1833;" the said claim being in said transcript numbered eighty-three.

3rd. The plaintiff then read in evidence the original concession to Pierre Chouteau, and the endorsements thereon of registry and record, with the depositions of Julius Demun and Mary P. Leduc, proving the signatures of Chouteau and the Soularde, and official characters of the Soularde, the one being Lieutenant Governor of Upper Louisiana, and the other late Surveyor General of same, and the date of the concession, 20th Nov. 1799; and proving that the translated copy of the grant above referred to, being marked J. D. in the margin of the record, is a true translation of the original.

4th. The plaintiffs then read in evidence a certified copy by the Commissioner of the General Land Office of claim No. 83—Peter Chouteau's—from the report of the Recorder and Commissioners under the acts of Congress of the 9th July, 1832, and 2nd March, 1833, being included in the first class in said report, which report was submitted to Congress in 1834; which said copy is certified to be a true extract from printed vol. 5, in his office, of the documents, Legislative and Executive, of the Congress of the U. S., in relation to the public lands.

5th. The plaintiffs then read in evidence a certified copy of a survey of Chouteau's grant as confirmed by the act of Congress of the 4th of July, 1836, made by the Surveyor General, showing that the lands in controversy are included within the boundaries of the survey.

6th. The plaintiffs then read in evidence, from a printed volume purporting to be printed by Blair & Rives, for the House of Representatives of the Congress of the U. S. at the first session of the 24th Congress, and entitled "Private land claims in Missouri," the report of the Recorder and Commissioners under the acts of Congress of the 9th July, 1832, and 2nd March, 1833, transmitted by the Recorder and Commissioners to the Commissioner of the General Land Office, and by him laid before Congress and read thereat as evidence; claim 83 being the same as the copy above referred to as certified by the Commissioner of the General Land Office, and therefore not again copied into the bill of exceptions. This report is the same referred to in the act of Congress of the 4th July, 1836, confirming this as one of the claims.

7th The plaintiffs then read in evidence the act of Congress of the 4th of July, 1836, referring to the said transcript of favorable decisions, transmitted to the Commissioner of the

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General Land Office as aforesaid and by him laid before Congress and confirming the same, Chouteau's claim No. 83, being one.

8th. The plaintiffs then read in evidence a patent from the U. S. to Pierre Chouteau or his legal representatives for the 30,000 arpents as confirmed, giving the boundaries thereof, bearing date 22nd of August, 1837.

9th. The plaintiffs then read in evidence a deed from the said Pierre alias Peter Chouteau to Wm. H. Ashley, the ancestor of the plaintiffs, for the said 30,000 arpents, bearing date 6th of Oct. 1836, with the certificates of acknowledgment and record endorsed.

10th. The plaintiffs proved that the said Ashley died before the commencement of the suits, leaving the plaintiffs in being his only heirs at law, and that the defendants were in possession of the lands sued for, at and before the commencement of the suits.

All the documentary evidence was given with an agreement that after all the evidence should be closed on both sides, the defendants should be at liberty to object to the competency or legality of the said evidence.

The plaintiffs then rested their case.

The defendants then introduced their New Madrid locations as follows:

1st. Certificate No. 259, dated 20th Feb'y, 1817, in favor of William Bomlette, or his legal representatives—survey thereon No. 2613, dated 10th Jan'y, 1820—and patent from the U. S. dated 23rd July, 1820.

2nd. New Madrid patent to James Norris, or his legal representatives for survey 2720, dated 1st day of July, 1828.

3rd. New Madrid certificate, No. 303, to Thomas Brooks, dated 26th May, 1817, located June 9th, 1817. Survey of same, No. 2600—patent thereon 3rd July, 1820. Certificate No. 474 to Francis Pasquier, dated Nov. 30th, 1818, located 1st Feb'y 1819—patent thereon 1st June, 1820. Certificate 476, to Andrew Wilson, dated Nov. 30th, 1813, located 1st Feb'y, 1819. Survey of same No. 2883, dated 10th Jan'y, 1820, patent certificate for same, dated 28th June, 1820.

The defendants then proved that the several tracts of land embraced in the said patents and patent certificates, were the only tracts of land mentioned in the declarations of which they had possession, and that they had been in possession thereof for several years prior to the commencement of the suits under the titles aforesaid.

Here the defendants rested their defence, and this being all the evidence on either side, the court thereupon, at the instance of the defendants, decided and declared that the documentary evidence given by the plaintiffs was not competent and legal evidence to show a right of recovery in the plaintiffs in this action to the land in controversy, and that the evidence given by the defendant, if true, was sufficient in point of law to defeat any right of recovery in the plaintiffs under the act of Congress of the 4th of July, 1836, or under the documentary evidence of title given by the plaintiff; and to this opinion of the court the plaintiff excepted; and thereupon the court, sitting as a jury, found verdicts for the defendants, and the plaintiffs filed their motions to set the same aside and to grant them new trials, alleging as reasons therefor the aforesaid opinion of the court; but the court overruled the motions and the plaintiffs excepted, and have brought the cases here by writs of error for relief.

ADAMS, for plaintiffs in error.

1. The confirmation of Chouteau's Spanish grant by the act of Congress of the 4th of July, 1836, under which the plaintiff's claim title, is a good legal title against the the U. S., and must prevail against the title set up by the defendants under the New Madrid locations, unless it is shown that the New Madrid locations were made in conformity with the laws of the U. S. See act of Congress, 2nd March, 1805; 2nd Story's Laws U. S. 966, chap. 86; act 28th Feb'y, 1806, chap. 11, sec. 3; act 21st April, 1806, chap. 39, sec. 3; act 3rd March, 1807; 2d Story's Laws U. S. 1059; act 15th Feb'y, 1811; 2nd Story's Laws U. S., 1178, chap. 81, sec.

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10; act 3rd March, 1811, same book 1197, chap. 113, sec. 10; act 26th May, 1824, act 21th May, 1828; act 9th July, 1832; act 2d March, 1833; act 4th July, 1836; Stoddard vs. Chambers, 2d Howard's Rep. 284; Barry vs. Gamble, 3 Howard Rep. 53-4.

2nd. The title set up by the defendants, under the New Madrid locations, is not good even against the U. S., and cannot prevail against the title under which the plaintiffs claim, because the locations were not made in conformity with the laws of the U. S., being made upon lands included in Chouteau's grant, "the sale of which was not authorized by law," but which had been expressly reserved from sale. See New Madrid act of 1815; 2nd Story's Laws 1500, chap. 198; Stoddard vs. Chambers, 2 Howard Rep. 284; Barry vs. Gamble, 3 Howard Rep. 53-4; Opinions of Attorney Generals Wirt and Butler, and the acts of Congress above referred to. Bissell vs. Penrose, decided by the Supreme Court U. S., at the December term, 1849.

3d. The New Madrid patents and patent certificate were issued without authority and are void in law, and their validity may be enquired into in this action.

4th. The 2nd section of the act of Congress of the 4th July, 1836, presupposes that the disposition therein referred to, of any of the land confirmed by the 1st section, was such a disposition as was good and valid under the existing laws of the U. S. when the same was made.

5th. Chouteau's grant was not only reserved from sale by the acts of Congress referred to, but being private property, was protected by treaty when this country became a part of the U. S., and as such, would remain inviolate, independent of treaty stipulations, as the dominion acquired by one power from another over an inhabited country, can never divest the vested rights of individuals to property. Delassus vs. U. S., 9 Peters 117; Chouteau vs. U. S., 9 Peters 137.

LEONARD & HAYDEN, for defendants in error.

1. The Spanish concession is neither a legal title, nor such a title under our statute as will support an action of ejectment.

2. Upon this record the Chouteau title commences, as against the defendant in error, with the confirmation; and the confirmation, by the act of July, 1836, as against the defendant, does not establish the existence of any prior claim.

3. If the existence of a genuine Spanish order of survey be assumed, as against the defendant in error, all claim under it was barred by the acts of Congress.

4. If the existence of such order of survey shall be assumed as against the defendant in error, it, as well as the confirmation of it, are expressly postponed to the defendant's title, by said act of confirmation relied upon by plaintiffs, independent of the statutory bars above alluded to.

5. The patent issued and read in favor of the plaintiffs is void because issued without any authority of law.

6. There is no evidence in the cause showing that the Chouteau claim was embraced in the act of Congress of July, 1836, relied upon by plaintiffs.

7. The patents and patent certificate relied upon by defendant in his defence to this action, are a good bar in law and equity as against the plaintiff's right of recovery.

8. The land located by the defendant was not, at the time of the location, reserved from sale in such manner as to invalidate the location of his New Madrid claim thereon. See Lewis Bissell, pl'ff in error, vs. Mary B. Penrose, decided Dec. term, 1849.

NAPTON, J., delivered the opinion of the court.

These cases have been before this court for some time, awaiting the

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ultimate determination of the Supreme Court of the United States upon the construction of the 2nd section of the act of Congress of July 4, 1836. That decision is supposed to have been finally made in the case of *Bissell vs. Penrose*, and upon that opinion these cases turn.

A very brief statement of facts will be sufficient to show the point upon which these cases turn.

In 1799, Chouteau presented a petition to Delassus for 30,000 arpents "60 miles below [above] the Osage, on the south side of the Missouri river"—in which quantity should be comprised the river a La Mine, and also the salt springs, which he designed to work at a time when he could do so in safety. This petition was granted, and Chouteau was directed to have it surveyed when convenient to his interests.

This claim was duly filed with the Recorder, and was before the Board of Commissioners in 1811, and was finally recommended for confirmation by the last Board, and consequently confirmed by the act of July 4, 1836.

There was no survey of the claim until 1837. The defendants held under New Madrid locations.

It is obvious that if Chouteau's claim be of such a nature as operated to reserve a specific tract of land by virtue of the act of Congress of 1811, the New Madrid locations upon it cannot avail the defendants.

In the case of *Bissell vs. Penrose*, it is clearly intimated that the claims reserved by the act of 1811, were such as had a fixed locality or could be reduced to a certainty by a survey. Surveys were deemed necessary in two classes of concessions. "1. A grant or order of survey for a given number of arpents, conferring upon the grantee the right to locate it upon any part of the royal domain, at his election. 2. A grant designating some national object only, such as the head or sources of a river, as a place where the tract should be located." The concession to Chouteau was of the latter description; it was to be located at the mouth of the La Mine, so as to embrace certain salt springs and the river. But the concession cannot, on the most favorable construction, be regarded as designating a specific tract of land. A surveyor could lay it off in a hundred different shapes, so as to answer every call in the grant. This being the condition of the claim at the time the New Madrid locations were made, the latter cannot be regarded as conflicting with any reservation under the act of 1811.

We understand the cases of *Bissell vs. Penrose*, and *Massey vs. Cerre*, as determining these cases in favor of the New Madrid locators. The judgments of the circuit court are therefore affirmed.

Humphreys vs. Magee.

HUMPHREYS vs. MAGEE.

1. Where a person deposits money with a stakeholder to be held to abide the result of a horse race, he may institute a common law action and recover the same at any time before the bet has been determined, such recovery may be had without reference to any provision in the act concerning gaming.
2. If the bet was made in the name of the plaintiff, the fact that others were interested with him in the bet, does not make it necessary that they should join in the suit.

APPEAL from Macon Circuit Court.

STATEMENT OF THE CASE.

This action was commenced before a justice of the peace by Magee, plaintiff, vs. Humphreys, defendant, on the second day of December, 1847, for the sum of \$66 66, for so much money placed in the hands of Humphreys by Magee, as a stakeholder, to be held to abide the result of a horse race then about to be run by said Magee and one John Cane. On the trial before the justice of the peace, Magee obtained judgment for \$46 66. From this judgment Humphreys appealed to the circuit court. On the trial in the circuit court, it appears by the evidence preserved in the bill of exceptions, that in the month of January, 1847, a horse race was made by Magee and Cane, and that Magee had placed in the hands of Humphreys, as stakeholder, the amount stated in his claim; it also appears that the race was run in the month of January, 1847. The preliminaries were managed in the usual manner, each of the parties choosing two judges. After the race the judges met but were unable to agree upon any decision, and thereupon Humphreys, acting upon the separate opinions of the judges, delivered over to Cane, as the winning party, the amount placed in his hands as stakeholder. It also appeared in evidence, that on the 19th day January, 1847, the day after the race was run, Magee demanded of Humphreys the amount placed in his hands as stakeholder.

The defendant, in the circuit court, proved that J. Jones was a partner with Magee in the bet—had \$15 in the stake; also that P. M. Stary was another partner and had \$22 in the stake. The plaintiff offered to read the record and proceedings of a former trial in this cause between the same parties, which was objected to by defendant and admitted by the court.

The court, on motion of the plaintiff, instructed the jury as follows:

1. If the jury find from the evidence, that the plaintiff placed in the hands of the defendant money to be held by defendant, as stakeholder, on a bet on a horse race, and that the plaintiff demanded of the defendant said money before the commencement of this suit, they will find for the plaintiff said sum of money, unless they find that said defendant had paid said sum of money to the other party in the bet after said bet was determined by the judges of said race or by the parties to the bet.

2. That if the bet was made in the name of the plaintiff, and he was the only party known to the stakeholder and person with whom the race was made, he may recover in this suit, notwithstanding other persons may have been privately interested with him in said bet, and the money put with defendant.

3. If the jury find from the evidence in this cause, that the plaintiff placed in the hands of the defendant money to hold as a stakeholder, on a horse race, made between the plaintiff, and that the plaintiff demanded the return of said money before the commencement of this suit, they will find for the plaintiff, if they find said race has not been determined.

The defendant then moved the court to instruct the jury as follows, all of which were refused:

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"1. If the jury believe from the evidence, that one J. White was a partner in the bet at the time it was made, and interested therein, they will find for defendant."

"2. If the jury believe from the evidence, that the separate opinions of the judges of the race run by the parties amounted to a decision, they will find for the defendant."

"3. That unless the jury believe from the evidence that the action was commenced within three months from the time the right of action accrued, they will find for defendant."

"4. That if the jury find for the plaintiff, they can only find such sum as was actually bet by himself excluding the sums put up by White and Sary."

"5. If the jury believe from the evidence in this cause that the plaintiff and Cane put up the money in the hands of defendant as a bet on a horse race, upon condition that defendant should hold the money in his hands till the race was decided, unless they believe the race was decided before the commencement of this suit, they must find for defendant."

The plaintiff had judgment for \$66 66, from which defendant appealed to this court.

WILSON, for appellant.

1. The court erred in giving plaintiff's instructions.
2. The court erred in refusing to give defendant's instructions.
3. The court ought to have set aside the verdict and granted a new trial.
4. The record of a former trial, as presented, was not legal evidence in the cause.

NAPTON, J., delivered the opinion of the court.

This was an action brought against a stakeholder to recover money paid over by him before the determination of the bet.

No reliance seems to be placed upon any of the points made at the trial, except two. The first was that the suit was barred by lapse of time—our statute relative to gaming requiring suits under that act to be brought within three months from the time when the cause of action accrued. The second point raised was by an instruction, that the plaintiff could not recover if others were partners with him in the bet, and at all events, could only recover so much as belonged to him individually. This instruction was refused.

If the action had been under the statute, the first objection must have been fatal. But we look upon the action as a common law one. It was not brought to recover back money *won* at gaming, nor was it based upon any provision of our act. It was founded on a common law right, to withdraw a sum of money bet, before the bet was determined. In this case, the court left it to the jury to say, whether the bet was determined or not. The bet was upon a horse race, and the judges of the race could not agree. Nevertheless the defendant, who was a stakeholder, paid over the bet upon some *exparte* opinion of the judges, after they had publicly announced their disagreement as to the result. The jury found for the plaintiff. The verdict, under the instructions, must be considered as a finding of the fact that the bet was

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never determined, and therefore the money handed to the stakeholder was, upon common law principles, so much money received to the use of the plaintiff. Such money may be recovered without any reference to any provision of our act concerning gaming, and such was the instruction of the court which tried this case.

In relation to the point which was raised by the defendant's instruction, that a recovery could not be had, if others than the plaintiff were privately concerned in the bet, that point was settled by this court in accordance with the opinion of the circuit court in the case of *Cato vs. Hudson*, 7 Mo. R. 142.

Judgment affirmed.

ROLLINS ET AL. VS. THE STATE, USE OF DUVALL ET AL.

1. Where a plaintiff, in an execution, or his attorney directs a sheriff to proceed under it, in some way other than that prescribed by law, he makes the sheriff his agent, and the securities of the sheriff are not liable for his acts.
2. Where an officer under color of his office proceeds to execute process and collects money under it, his securities are liable for a misapplication of it, although the writ may be defective, erroneous, or even totally illegal.
3. The mere application to the court by the plaintiff for an erroneous or illegal order, upon which a writ issues, is not such an interference as makes the executive officer his agent.

ERROR to Boone circuit court.

STATEMENT OF THE CASE.

This was an action of debt against James S. Rollins and others, the official surities of F. A. Hamilton, as sheriff of Boone county, upon his official bond of the 7th of August, 1840, and was tried in August, 1849, upon the statute general issue of 1845.

The declaration contained three counts. Upon the trial which took place before the judge it was agreed that a writ of attachment, at the suit of the present plaintiff, had in May, 1841, had been issued out of the Boone circuit court against Ward and Parsons, directed to the sheriff of Boone county, and that Hamilton, the sheriff, by virtue of the writ, levied upon a large amount of merchandize as the property of the defendants without suit. In June, 1841, an order was made by the judge of the Boone circuit court, upon the petition of the plaintiffs for the sale of the merchandize, cash for all sums under fifty dollars, and upon a credit of six months for all other sums; the sheriff to take bonds payable to himself with security. Hamilton accordingly made the sale in June and July, 1841, the total amount of which was \$9559 04, of which \$300 was for cash, and the residue upon credit. Hamilton received the cash and took

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the bonds, as required by the order of the court, and made a report of his proceedings at the June term, 1844, of the Howard circuit court, (to which court the cause had been removed by an order for a change of venue,) and was allowed for his services \$516 43 to be deducted from the proceeds of the sale. In August, 1842, Hamilton's first term of service expired, and he was re-elected, gave a new bond, and his second term expired in August, 1844, when his successor was elected. Hamilton, during his second term and after the expiration of that term, paid over \$5433 35 of the bonds taken upon the sale, \$4,997 36 of which was on solvent persons and has been collected, and the balance, \$435 35, was on insolvent persons, and uncollectable. He had also paid over in cash \$1325 01 and the residue of the proceeds of the sale Hamilton had converted to his own use and refused to pay over to the persons entitled, or to have in court according to his duty, although frequently applied to for that purpose during his first and second term, and after he went out of office. He died in 1845, and no administration was ever taken upon his estate.

It was agreed, if the defendants were liable, judgment should be given against them in this suit for the amount for which they were liable, to be held in trust for the present plaintiffs and plaintiffs in other attachment suits against same property, according to the terms of an agreement between those parties.

For the purpose of raising the questions of law upon the record, several instructions were asked, some of which were given and others refused.

The court gave judgment for \$3337 64, being the value of the solvent bonds and interest, and from this judgment the defendants have appealed.

HAYDEN, for plaintiffs in error.

1. As these defendants are the securities of the sheriff, Hamilton, they have the right to stand upon the very terms of their contract or undertaking, and in the construction of it, the law requires it to be construed strictly and according to its letter, so as not, by implication, to extend their liability for the acts of their principal. 9 Wheaton, 680, S. C. 5th, Cond. Rep. U. S., *Miller vs. Stewart et al.*, 727; same book, 733, U. S. vs. *Kirkpatrick*, 9 Wheat., 720; 7 Cowan, 743; *Gorham vs. Gale*, 2 Pick, 234-5.

2. The order of the judge of the circuit court, in which the suit by attachment was pending, made upon the petition, and at the request of the plaintiffs in the cause, for the sale of the property attached by the sheriff, upon a credit of six months, was a proceeding not warranted by law, and is void, and amounted to such an intermeddling with the process by which the property was attached, and in the hands of the officer, as to constitute the sheriff their private agent to execute their will and their own direction, and to absolve these defendants from the liability which the law would have imposed upon them, had the sheriff been left to the directions and disposition of the property as prescribed by law. See 15 Vermont Rep. 414; 14 Vermont 378; 6 Monroe Rep. 173-4; 3 Dana 152; 1 Metcalf 36; 6 Metcalf 112; 12 Vt. 453; 13 Vt. Rep. 9; 7 Con. 739, 745-6; 6 Con. 465 and note (a) 466-7; 4 Howard's U. S. Rep. p. 1, 2, &c.; 15 Wend. Rep. 579, 580, *Walden vs. Davidson*.

3. The circuit court erred in declaring the law of the case upon the finding of the issues as prayed for by the plaintiff, and in declaring the law not to be as prayed for by the defendants.

4. The circuit court found the issues for the plaintiff and rendered judgment thereon against law and evidence.

LEONARD, for defendants in error.

The question upon the record is whether the official sureties of a sheriff are responsible for the proceeds of a credit sale of attached perishable property made by order of the judge, and which have come to his hands, and if liable, whether this liability in this instance is upon the sureties of the first or second term?

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1. It was competent for the court or judge to order the sale to be made upon credit. A general power over the subject is conferred upon the court or judge, and the provision of the statute that the proceedings of a sale of attached perishable property shall correspond with the proceedings in execution sales, may be considered as merely directory to the sheriff in the absence of other special directions by the court, or if it is to be considered as also directory to the court, is a provision like many similar ones to be found in the statute book, and that the court may dispense with.

2. If this be otherwise, and the law is directly opposed to a credit sale, yet the order directing such a sale was not void, but at most merely voidable, and it was the sheriff's duty to obey it, and his acts or omissions in relation to an erroneous or voidable order, are official acts for which his sureties are liable. *Hecker vs. Janett*, 3 Binney 409; *Walden vs. Davidson*, 15 Wend. Rep. 575; *People vs. Dunning, Sheriff*, 1 Wend. 16, 17; *Jones vs. Cook*, 1 Cow. Rep. 309.

3. Admitting, however, the last proposition to be otherwise, and that the sheriff was not bound to obey the order, yet having obeyed it and acted in that matter "by color of his office," these acts and omissions are within the condition of his bond, and his sureties must answer for them. *Carmack vs. Commonwealth*, 5 Binney, 184; *Commonwealth vs. Stockton*, 5 Mon. Rep. 193; *Knowlton vs. Bartlett*, 1 Pick. Rep. 271.

4. Here, however, the case shows that Hamilton converted the proceeds of the sale to his own use, and having obtained them by color of his office, his sureties must answer for them. *New Hampshire Savings Bank vs. Varnum*, 1 Met. Rep. 35; *Walden vs. Davidson*, 15 Wend. Rep. 575; *People vs. Dunning*, 1 Wend. Rep. 16, 17; *Harrington vs. Fuller*, 18 Maine Rep. 277; *Knowlton vs. Bartlett*, 1 Pick. Rep. 27; *Clute vs. Goodel*, 1 McLean's Rep. 193.

5. The order of sale having been received and the sale made during Hamilton's first term, the securities of that term are responsible. The State use of *Vance vs. Marney* and others. Decision of this court at January term, 1850.

NAPTON, J., delivered the opinion of the court.

The question which, in our judgment, is decisive of this case, is whether the sheriff in the execution of the writ of *venditioni exponas* was acting *colore officii*, or was the mere agent of the plaintiffs.

The cases upon this subject, most of which will be found cited in the briefs, clearly show that where an officer departs from his line of duty pointed out by the law, at the promptings of the plaintiff, his securities are discharged.

The responsibility of an officer bound by law to sell for cash and cash only, is materially different from a responsibility for credit sales. The risk is greater. The case of *Kimball and Co. vs. Perry*, 15 Verm., is a sensible commentary upon this distinction, and establishes that if such sales are undertaken at the instance of the creditor or the creditor's attorney, the securities of the officer are not responsible.

I think most, if not all the cases cited, where the courts have held the securities discharged, will be found cases where there has been an interference by the plaintiffs in the writs. In such cases, the party, by directing the officer to proceed in some other way than that prescribed by the law, makes the officer his agent, and the securities are no longer

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liable for his acts. The practice and propriety of this is so manifest as to need no illustration.

On the other hand it seems to be equally well settled, and as consonant to justice and policy, that where the officer professes to act under color of his office, and under the sanction of a writ, the responsibility of his securities for any malfeasance in its execution is not discharged by reason of defects or errors or total illegality in the process. It would be strange if the law were otherwise. Where a court has jurisdiction of the action, the officers are not responsible for errors in the process. If the officer proceeds on the process and treats it as valid, he is bound to pay the money he collects under it, and the money being received by him *colore officii*, his sureties are liable for its misapplication. *Walden vs. Davidson*, 15 Wend. 575.

The question is in this case as in others of a similar character, was the act official or personal?

It is clear that there was no departure from the mandates of the writ and no interference on the part of the plaintiffs after its issuance. The sheriff did not profess to sell by virtue of any directions from the plaintiff, but in obedience to the order of the writ of *venditioni*. The fact that this order was erroneous, and might perhaps have been disregarded, cannot alter the case. The application for the writ is no such interference of the plaintiffs as makes the officer their agent. All writs issue on the application of some one, and the machinery of the law must be put in whenever it acts at all. The writ was issued on the order made by a court having jurisdiction over the subject matter. It is neither justice or sound policy that private individuals should suffer by the blunders of the officers of the law, either judicial or ministerial. We cannot regard the writ or order as a mere nullity. Would the sheriff have been liable as a trespasser for proceeding under it? We think not.

Judgment affirmed.

SKINNER ET AL. VS. HUGHES.

1. If a person sells intoxicating liquors to a slave without permission from his master, owner or overseer, by which he is made drunk and of which he dies, such person is liable to the owner for all the legal damage that may thence ensue.

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2. Where a clerk in a store is in the habit of selling whisky to slaves, without permission from the masters, owners or overseers thereof, and his employer knows of such habit and does not stop it—it is evidence of the employer's agency in such sales and is sufficient to charge him with the consequences.

APPEAL from Platte Circuit Court.

STATEMENT OF THE CASE.

This was an action on the case by Mrs. Hughes against Skinner, Shepherd and Baker for an injury to her slave, that occasioned his death, and was tried at the March term, 1850, of the Platte circuit court.

Upon the trial, it appeared that the plaintiff was the owner of a slave, Willis, worth nine hundred dollars, and the defendants, Shepherd and Skinner, were the owners of a store in which they sold intoxicating liquors not less than a quart, and a mill, and Baker was their clerk. In January, 1849, the boy came to the mill with grain to be ground, and while there went to the store with a bottle, bought a quart of whisky, carried it to the mill and there drank it with the white hands about the mill—got drunk, started home about sun-down and was found early next morning lying on his face in the road not far from the mill speechless, his jaws locked and frozen nearly to death. He was taken to the mill immediately, received immediate medical attendance, lived 8 or 9 days and died.

The whisky was sold to the boy without any *permit* from his owner, and neither Skinner nor Shepherd were present at the time. The clerk (Baker) was in the habit of selling whisky to the slaves without the permission of the owners and Shepherd was frequently present when this was done and made no objection.

The court gave the following instructions asked by the plaintiff:

"The court instructs the jury, that if defendant, Baker, sold whisky to the negro boy, Willis, slave of the plaintiff, without the written permission of the master, owner or overseer of such slave, by which means said slave was made drunk and became frozen, whereof he died, and was lost to plaintiff, the jury will find for plaintiff as against Baker, and if Baker so sold such whisky, by the direction, command or procurement of Shepherd or Skinner, or both, the jury will find as against them also; but if Baker so sold it without the direction, command or procurement of Shepherd or Skinner, then in this latter event they or either of them not so having any agency in the sale, are entitled to an acquittal."

"The jury may find against all the defendants or one, or two and acquit the others, as they shall deem the evidence requires. The mere fact that Baker was clerk of Shepherd and Skinner, and sold whisky to the slave in question, does not conclusively prove that they directed, commanded or procured Baker to sell the whisky to the slave in question, but if it was the habit of Baker to sell whisky to slaves without written permission from the masters, owners or overseer thereof, and Skinner or Shepherd knew of such habit, and did not stop the same, it is proof of their agency in such sales sufficient to charge them; and if Baker was the clerk of Skinner and Shepherd and they kept whisky for sale, the presumption is that Baker was acting under their direction."

"The material question for the jury is, the fact of the sale, and consequent injury, and not the intent of Baker in making such sale, that being entirely immaterial. If Baker did not sell the whisky to the slave, the jury will find for defendants, or if the whisky so sold was not conducive in making the negro drunk, the jury will find for defendants."

The defendants asked the following instructions, all of which were refused by the court:

"1. That unless *plaintiff*, [defendants] sold whisky to the negro boy, Willis, the property of plaintiff with the intention of making him drunk or doing him some injury, the jury must find for defendants."

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"2. If the defendants were innocent of any intention of injuring the negro, or the plaintiff, and let him have the liquor with no improper view or intention, they must find for defendants."

"3. If they believe that Baker the agent and clerk of Skinner & Shepherd, knew the bottle brought by the negro to be the one used at the mill, or believed it to be so, and that the negro had been sent from the mill to buy the whisky, and he let him have it, supposing he was sending it to white persons, at the mill and not selling it to the negro, they must find for defendants."

"4. Unless they find the whisky was sold to the negro with the intention to sell to him, the defendants are not guilty."

"5. If the jury find that the negro was drinking with white men at the mill, and they sent him with the bottle usually sent by them for whisky, and the negro got the whisky accordingly, and took it back to them, and they drank it, permitting the negro to get drunk on it, they must find for defendants, although they may believe the negro paid for it."

"6. If they believe that white men sent for the whisky by the bottle usually sent by them, and permitted the negro to get drunk, they must find for defendants."

"7. If they find that white men at the mill gave the negro the whisky and made him drunk, they must find for defendants."

"8. If they believe that the negro and white men were drinking together at the mill, and the negro got drunk there among them without the knowledge or consent of defendants, they must find for defendants, although they may have sold the whisky that made him drunk, if they did not intend to make him drunk, to give him liquor, or had no knowledge of the fact that he was so drinking."

"9. The defendant, Baker, cannot be liable in this action, if the jury find that he was acting as clerk for wages, and performed all the duties required of him and did not exceed his instructions."

"10. If the intoxication of the negro proceeded from whisky other than what Baker sold to the negro, then they will find for defendants."

The jury found a verdict for \$900, for which the plaintiff had judgment, after motions for new trial and in arrest were overruled.

WILSON, for appellants.

The only point I shall make in this case is upon the refusal of the court below to give the seventh and tenth instructions asked by defendants, together with that part of the instruction given by the court of its own accord, which throws the burden of proof upon two of the defendants, Skinner & Shepherd, when in law, the burden was on the plaintiff.

LEONARD, for appellee.

1. The sale of the whisky to the plaintiff's slave was an unlawful act, not only by statute, but at common law, independent of the statute, and subjected the defendants to all the damages that resulted from that act. Rev. Stat. 1843, p. 542, sec. 7 and p. 1018, sec. 33. 10 Co. Rep. 75; 6 Bac. Abridg. title "Statute," letter K., p. 392, 393; 2 Ld. Raymond, 985; Harrison vs. Berkley, 1 Strobharts (S. Car.) Rep., 525.

2. The death of the negro, if it resulted from the freezing, and that was occasioned by drunkenness, which was produced by the whisky purchased of the defendants, is a damage for which the defendants are liable. Harrison vs. Berkley, 1 Strobharts (S. Car.) Rep., 525; Strawbridge vs. Turner, 9 Louisiana Rep., 213; Wright vs. Gray, 2 Bay (S. Caro.) Rep., 464; McDaniel vs. Emanuel, 2 Rich. (S. Caro.) Rep., 455; Duncan vs. Railroad Company, 2

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Rich. (S. Caro.) Rep., 615; Lynch vs. Nurdin, 41 Eng. Com. L. Rep., 422; Illidge vs. Goodwin, 24 Eng. Com. L. Rep., 272.

3. The instruction given by the court is correct in point of law, and contains a proper direction upon the questions of law involved in the defendants' 7th and 10th instructions.

NAPTON, J., delivered the opinion of the court.

We are well satisfied with the verdict and judgment in this case; and heartily approve of the legal principles upon which they are based.

¶ It is not always an easy task to discriminate between the remote and consequential damages resulting from an act, and those which are its natural and proximate consequences. The law refuses to take into consideration the former, but holds the agent responsible for the latter. And this general principle is applicable equally to contracts and torts, where there is an absence of all fraud, malice or oppression and there is no intention to injure.

In this case we regard the death of the slave as the natural consequence of the act of the defendants in providing him with the means of intoxication. By *natural* consequences, it is not meant that they should be such as would upon calculation of chances be likely to occur, or such as extreme prudence might anticipate; but "*such as have actually ensued* without the occurrence of any such extraordinary conjunction of circumstances, as that the usual course of nature has been departed from."

The sale of whisky to the negro was unlawful, but that does not constitute the source of responsibility. The defendants might have sold the negro a rope, with which he immediately went out and hanged himself. The distinction between such a sale and a sale of intoxicating liquors is obvious. The former, though a breach of law, was not likely to be attended with injurious consequences, without a concurrence of circumstances and co-operation of acts on the part of the slave, not to be expected in the usual course of events. The latter is like placing noxious food within the reach of domestic animals.

These are the general principles upon which the instructions given by the circuit court were based and we have barely alluded to them, without going into a more particular investigation. That has already been performed in so able and satisfactory a manner by the supreme court of South Carolina in a parallel case, (*Harrison vs. Berkley*, 1 Strobbart Rep., 525,) that we prefer referring to that opinion for a full discussion of the whole subject.

The plaintiffs in error, however, admitting the general principles to be as above stated and as decided in the instructions given to the jury,

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insist that the seventh and tenth instructions, asked by the defendants, should have been given. These instructions substantially asserted, that if the drunkenness, which brought about the negro's death, proceeded from whisky other than that sold by the defendants, they are not liable. The objection to such an instruction is, that there was no evidence before the jury to warrant it. That the negro had been furnished with some intoxicating liquor before he purchased the whisky from the store, was proved, but it was clearly proved that he was entirely sober when he made the application to defendants' clerk. Moreover as the facts stood, it would seem to be quite immaterial whether the defendants furnished the whisky at their store or at their mill, and all the whisky drank was procured at one place or the other.

The principle asserted in the instruction as to the liability of the defendants for the acts of their clerk, and as to the rule by which the jury were to determine their approbation of his conduct, was correct in law and morals.

Judgment affirmed.

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In order to correct errors of the circuit court in excluding or rejecting testimony, or in giving or refusing to give instructions, the party complaining must file his motion for a new trial.

APPEAL from Barry Circuit Court.

ROBARDS, for appellee.

The court must affirm the judgment of the circuit court, because there was no motion for a new trial filed, to enable the circuit court to correct the errors committed and complained of, if any. *Floersh vs. Bank of Mo.*, 10 Mo. Rep. 515; *Rhodes vs. White*, 11 Mo. Rep. 623; *ib. Watson vs. Pierce*, 358.

The court below properly excluded from the jury the evidence offered to prove that Pogue had been appointed by the county court assessor of Barry county; because it was proved and admitted that Harbin had been previously elected and was qualified as the assessor of that county. The evidence offered could be competent only in the event that Harbin had ceased to hold the office. Had a vacancy of the office been proved, then Pogue's appointment and qualification might have been competent. The evidence offered to be given by the sheriff did

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not conduce, in the least, to prove a vacancy of the office, and that offered to be proved by the witness, Perry, showed only an intention to resign, and that the intent was never carried into effect. In any view of the subject, the court did right in excluding from the consideration of the jury the evidence offered by the defendant.

RYLAND, Judge, delivered the opinion of the court.

In looking into the record and proceedings in this case, as well as into the bill of exceptions, I find no motion made for a new trial—no exceptions taken to any instructions given or refused to be given by the court below.

I find from the record, a motion was made by defendant to rule the plaintiff to give bond and security for the costs of this suit. This was overruled. The defendant then moved to quash the writ, because its recitals were in the present instead of the past tense; also, because the sheriff had not properly served the same on the defendant. This motion was overruled, and the defendant excepted to the opinion of the court in overruling this motion, and tendered his bill of exceptions. There is no error in the action of the court in overruling the motion to quash the writ. The defendant had already appeared to the writ, and moved to rule the plaintiff to file bond with security for costs of the suit.

The second bill of exceptions only preserves the action of the court in rejecting certain evidence offered by the defendant.

Under the repeated decisions of this court, the defendant was bound to have made his motion for a new trial, in order to avail himself of the errors, if any had been committed by the court below, in thus excluding or rejecting testimony, or in giving or refusing to give instructions.

It nowhere appearing in the record, that any motion was made for a new trial, the judgment below must be affirmed. See *Watson vs. Pierce & Pierce*, 11 Mo. Rep. 358; *Rhodes vs. White*, 11 Mo. Rep. 623; *Stevens vs. Sexton*, to the use of Schanck, 10 Mo. Rep. 31; 10 Mo. Rep. 515, *Floershs vs. Bank of Mo.*

Harrison vs. Renfro.

HARRISON vs. RENFRO.

Where a special judgment has been rendered against a debtor, without a personal service, under a proceeding in attachment, upon the death of the debtor after the rendition of the judgment, the lien of the attachment is lost. Nor can such judgment be made the basis of any proceeding in the county court; nor can an execution issue thereon.

ERROR to Callaway Circuit Court.

STATEMENT OF THE CASE.

Crockett Harrison sued Reuben M. Renfro in the Callaway circuit court to the October term, 1844, by petition in debt, and attached two slaves in the possession of Mrs. Renfro as the property of the defendant, and had judgment by default, on publication of notice at April term, 1846. At the October term, 1844, Mrs. Renfro appeared and claimed the attached slaves, and upon a trial of the issue made on that plea, the plaintiff, Harrison, had a verdict and judgment, which was reversed in this court at the January term, 1847; (10 Mo. Rep. 412.) A second trial of this issue took place in the Spring term, 1848, of the Callaway circuit court, when a verdict was again found for the plaintiff, Harrison. A motion was made by Mrs. Renfro to set aside this verdict, on the ground that the court had improperly excluded evidence which she had offered; that the court improperly decided the law of the case; and that the verdict was against the law and evidence. A new trial was granted, to which the plaintiff, Harrison, excepted, and filed a bill setting forth the evidence given on this trial.

Reuben M. Renfro, the defendant in the original suit, died in May, 1847, and at the October term, 1848, the claimant suggested and established the death of the defendant, and moved the court to stay all further proceedings upon her claim, and allow her to retain in her possession the attached slaves. The court adjudged accordingly, and to this opinion the plaintiff excepted and took a bill of exceptions, upon which the cause is brought to this court.

ANSELL, for plaintiff in error.

1. When a person is absent, not a resident of nor residing within the State, an attachment is given against his property, not against his person. The lien of attachment holds the property until judgment, and if the party, on publication, does not appear, and judgment is rendered by default, such judgment binds the property attached, unless the defendant appears and sets aside said judgment according to the regulations of the statute concerning attachments. See attachments, secs. 14, 15, 16, 17, 25, 26, 47, 51, 59, Statutes Mo. page 138, &c.

2. The death of the defendant can have no effect in setting aside a judgment in rem. The judgment is a special judgment against the property—has no force against the person or other effects of the deceased, except the property bound by such judgment. The property is divested from the control of said defendant, his heirs, executors, administrators and assigns, to the intent of said judgment, unless the proper means are taken as prescribed by law to set aside said judgment, and release the property from the lien of said judgment. Reuben Renfro never made any attempt to set aside said judgment, and therefore it binds the attached property so far as he is concerned, And if the judgment does not bind the property, it must

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be presented to the county court and classed, and therefore the right of the interpleader ought to have been settled. *Swearingen vs. Eberius*, 7 Mo. R. 421; *Clark vs. Holliday*, 9 Mo. R. 713; *Prewitt vs. Jewell*, 9 Mo. R. 732.

3. Mrs. Renfro had a right to interplead in the cause, if the property attached was hers, and to have issues made up and tried as on a collateral proceeding. She had no right to suggest the death of Reuben M. Renfro as a reason for dismissing the interpleader and cancelling the attachment bond. The court was competent to try the issue between the interpleader and plaintiff in the attachment, and she could only divest the lien of the judgment on such property by proving it to be hers. She voluntarily abandoned her rights, if any, by her motion to dismiss, and ought to be adjudged to pay costs in said interpleader. See attachments, secs. 39 and 40; Stat. Mo. page 141, &c.

4. Mrs. Renfro held a life interest in the negroes, a vested remainder was in the heirs, of which Reuben was one. There was a priority between the mother and children, and a relinquishment on her part by deed, with delivery of said deed, was of sufficient possession of those in remainder, even without actual delivery of the negroes to them to render them subject to the demands of creditors. 2 Blu. 164 to 169, side paging; 2 Blu. 325, 326, side paging.

5. But there was an actual and positive delivery of the negroes to all the children, except Reuben, and so found by the jury on two separate trials. They were delivered to the child by Mrs. Renfro for distribution. They were valued for sale by her consent, and sold with her knowledge, and she afterwards stated that she was keeping Sam and Margaret for Reuben M. Renfro. It was clearly proved in the last trial that Shelton acted as the authorized agent of Reuben.

6. The children, before distribution, were tenants in common, and delivery to one is delivery to all; but they were all present or represented, and consenting to all the acts of distribution and delivery, and Mrs. Renfro's after claim was an after thought to screen the property, from the debts of Reuben M. Renfro. 2 Blu. 399, note 12, 399; 4 Kent, 370.

7. A verbal gift is only good by delivery, and a gift by deed, under the statute, must be by will or deed proved or acknowledged according to its provisions; but a gift, not executed, becomes a contract if it be on sufficient consideration, and the nearness of relationship was sufficient to turn the gift (if such relinquishment were one) into a contract which the party might be compelled to execute. Stat. of 1835; Slaves, art. 3; 2 Blu. 441, 444, 446; *Fraudulent Conveyances*, page 526, sec. 4; 3 Litt. 278.

8. If possession accompanied the deed, it was unnecessary for the deed to be recorded.

Possession was clearly proven to have accompanied the deed, which is recited in the deed, which is the best evidence of the facts which it recites, as every person is estopped from denying that which he has declared under seal, and this deed declared "that to the above named children I have given the following lot of negroes to be by themselves distributed among themselves, with instructions that each one of them shall receive an equal portion." 9 Mo. Rep. 156, *Dickenson vs. Anderson*.

9. The deed was delivered, with the consent of the legatees, to Elijah Stephens for safe keeping. He produced it on a former trial and left a copy with the clerk. He had notice to produce it on the last trial; he could not find it but was confident it was in the hands of the legatees, or one of them. Under these circumstances, the copy left by said Stephens with the clerk, and proved to be a true copy, ought to have gone to the jury. 1 Starkie, 437, 439.

10. It was a palpable case of premeditated fraud, and there was sufficient latitude in the instructions, and the evidence was abundant to warrant the finding of the jury; therefore the court exercised its discretion unsoundly in setting aside the verdict of the jury, and in granting a new trial, and also in dismissing the proceeding on interpleader and discharging the obligation of Chloe Renfro on the attachment bond.

LEONARD, for defendant in error.

1. The death of the defendant in the original suit dissolved the lien of the attachment, and

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therefore the further prosecution of the claim on the part of the claimant would have been a nugatory act, and of course the court properly stayed any further proceeding in the matter. *Swearingen vs. Administrator of Eberius*, 7 Mo. R. 421; Statute of 1st Feb. 1836, title "Executors"; Revised Statutes of 1835, title "Administration," art. 4; Revised Statutes of 1845, title "Administration," art. 2, sec. 54, 55 and 56.

2. The granting of a new trial is not matter for error. *Emmerson vs. Harriet*, 11 Mo. Rep. 413.

3. If it be, the court cannot see that there is any error in the allowance of the new trial in the present instance, as it does not appear from the bill of exceptions what evidence was offered by the claimant and rejected, or that there was no evidence so offered and rejected.

4. The verdict was rightly set aside.

NAPTON, J., delivered the opinion of the court.

In the case of *Swearingen vs. adm'rs of Eberius* (7 Mo. Rep. 421) the court quashed a *fieri facias* against the attached property and left the plaintiff to proceed with his judgment in the county court. No opinion was designed to be given in that case, by either Judge Scott or myself, in relation to the lien of an attachment or a judgment. I was not present when the opinion was filed, and Judge Scott filed a note of the ground upon which we put the case. In the subsequent case of *Prewitt vs. Jewell*, the point in relation to the lien of a judgment came up directly, and Judge Scott did then come to the conclusion that the lien of the judgment was lost by the death of the judgment debtor, so that if it had been deemed necessary in the case of *Eberius' adm'r vs. Swearingen*, a majority of the court would doubtless have held in that case that the lien of the attachment was gone.

In this case of *Swearingen vs. Eberius' administrator*, the defendant died before any judgment, and the administrator appeared to the action and a judgment was rendered against him. All that the court was called upon to do in that case, was to quash the execution, and this was done. The judgment being against the administrator, was still available as a general judgment, and the plaintiff only lost his priority of lien upon the property attached.

The present case is somewhat different. There is here a judgment against the deceased, without any personal service, and the defendant died after this judgment.

The 17th section of the attachment law declares the effect of a judgment by default. It declares "such judgment shall bind only the property and effects attached, and no execution shall issue against any other property of defendant nor against his body, nor shall such judgment be any evidence of debt against the defendant in any subsequent suit."

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It is obvious from this provision, that this judgment by default cannot be made the basis of any proceeding in the county court. It is equally clear, that the court could not proceed and make the judgment a final one against a dead man. Nor, if such a judgment could have been rendered, could any execution have issued under the laws of this State.

Of what avail, then, can it be to proceed with the interplea? So far as the question relative to the lien of judgment is important, our statute has stepped in and pointed out a mode in which that lien is retained and enforced. But the lien of an attachment has not been provided for. It is obviously a *causus omissus*.

What power has this court, or any court of chancery, to remedy this defect? It is a mere statutory remedy to enforce a right, and the statute must be pursued. If the law is defective, the legislature can alone supply the defect. The ordinary mode of enforcing the right is still open to the suitor. The action is not lost. The suit can be revived against the administrator, and the question of title can be as well tried in such a proceeding as in the present. Nothing is lost but the lien on the specific property attached, and as the supposed owner is dead, and incapable of further fraud or injustice, this may be a very unimportant matter to the plaintiff. The circuit court merely dismissed the interplea for the plain reason, that its further investigation could lead to no practical result. The plaintiff may still proceed with his action; have it revived against Renfro's administrator, and if there be no prior creditors, have the same question of property as advantageously adjusted under our administration law, as he could have in this interplea.

Judgment affirmed.

BIRCH, Judge, dissenting.

Harrison sued Renfro, by petition in debt, and attached two slaves in the possession of his mother, the defendant here. Upon proof of publication, at the April term, 1846, he obtained judgment by default against the original defendant, and also against the defendant here, upon her interplea. The verdict and judgment thus obtained against Mrs. Renfro having been reversed by this court at the January term, 1847, a second trial of the issue between her and the plaintiff took place at the spring term, 1848, and resulted again in a verdict against her. A new trial was granted, however, the propriety of which the state of the record does not enable us properly to consider. The defendant in the original suit, and against whom the judgment by default for the debt and damages continues unreversed, having died in the month of May,

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1847, at the October term, 1848, the interpleader moved the court to stay all further proceedings and allow her the possession of the attached slaves. The court having adjudged accordingly, and dismissed the suit, the plaintiff excepted, and has brought the case here.

As reliance to sustain the judgment below seems mainly to be cast upon the opinion of a former bench of this court, in the case of *Swearingin* vs. the administrator of *Eberius*, an expression of the respectful disconcurrence which is entertained with the reasoning and conclusion of the able judge who prepared it, might perhaps well enough be foregone by demonstrating the want of sufficient analogy between that case and the present one, to invest it with the authority here claimed for it. It is, however, deemed most appropriate to remark, that being unable to perceive less legal merit in commencing and maintaining a proceeding by attachment than in the more ordinary manner, any valid reason why such a suit should not, in the very words of the statute which authorizes it, "be proceeded on to final judgment in like manner as in ordinary actions," has not been to my mind rendered apparent by the argument here. It is true that no *execution* could issue against a deceased defendant, but that, it is apprehended, does not meet even the *general* question, much less the special one now under consideration. Unless indeed equity would be powerless, after years of diligence and expense, to enforce a lien thus sought to be perfected, it is of course readily perceived how the final judgment, which is alone sought, might be thereby rendered available to the plaintiff. The dismissal of such a suit, consequently even had no judgment been rendered against the original defendant, could alone be predicated upon a more restricted estimate of the powers and duties of a chancellor, than is entertained by the author of this dissent.

In this case, however, there was and is a specific and formal judgment against the *original* defendant, so that the *only* question which remained for adjudication, at the time the suit was dismissed, was between *living parties* on the interplea of the defendant here. The court before whom that issue was pending, was certainly not only *competent* to determine it, but, it would seem, even peculiarly appropriate that it should retain the suit for the purpose of doing so. It would thereby, not only more readily than in any other manner, settle the question as to the ownership of the property, thus removing the impediment which would otherwise exist to a safe and proper administration upon the effects of the deceased, but if the verdict of the jury was again adverse to the claim of the defendant; again found the property to have been properly attached by the plaintiff, and of course subject

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to his lien, the 54th, 55th, and 56th sections of the 2nd article of the administration law, would furnish either to the administrator in discharging, or to the chancellor in enforcing it, an appropriate analogy, and a safe and an equitable guide.

It is thought, therefore, for the reasons thus stated, that the judgment of the circuit court should be reversed, and the cause remanded for the further and final proceedings thus intimated.

WOOD vs. EDGAR.

A special deposite of coin does not constitute the depository a debtor within the meaning of the sixth section of the act concerning executions, so as to subject him to a garnishment upon an execution against the despositor.

ERROR to Cooper circuit court.

STATEMENT OF THE CASE.

The plaintiff in error, at the September term of the circuit court of Cooper county, obtained a judgment against James L. Collins and David Workman for the sum of \$1273 22 for his debt and damages and for costs, and to obtain satisfaction of his judgment, he caused an execution to be issued upon it and placed the same in the hands of the sheriff of Cooper county to be executed. The sheriff finding no property of the defendants upon which to levy the same, at the instance of the plaintiff summoned the said James M. Edgar as garnishee, to answer interrogatories to be exhibited by plaintiff at the return term of the writ, as is provided in the 6th section of the act regulating proceedings by and upon execution.

The plaintiff exhibited his interrogatories to the said Edgar, who, as garnishee, answered that at the time of his being summoned he had \$1000 of American gold (in his possession) of the said Collins, and still had the same, and that said Collins had placed it in his hands, with directions to him, said Edgar, to endeavor to compound with the creditors of the late firm of said Collins and Workman, and to use the same in compounding with said creditors upon the best terms he could procure; and thereupon he submitted to the court the matter, whether the money so in his hands was subject to the demand of the plaintiff or not.

Upon this answer the plaintiff moved the court for judgment against said garnishee; and the court decided that the money was not liable to his demand, and thereupon rendered judgment for costs of the proceedings against the plaintiff. The plaintiff excepted to the opinion of the court, and moved the court for a new trial, which being overruled, the case was brought to this court by writ of error.

HAYDEN, for plaintiff in error.

1. The statute authorizing the proceedings by garnishment is a remedial statute, and should

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be liberally construed by the courts to effect the object of its enactment; and in doing so, the courts will understand by it, that the legislature intended to afford the creditor the means of reaching such effects of the debtor as are or may be in the hands of strangers to the execution, and which are not tangible or to be found by the ordinary means resorted to by the officer holding the execution, in a faithful discharge of his duty.

It was the intention of the legislature to afford a creditor, upon his writ of execution, in his suit by garnishment, (if the phrase be allowable) the same measure of justice as is afforded the creditor in a similar proceeding, upon his writ of attachment. The object, policy and reason of the two statutes being precisely the same, as is manifested as well in the form of the proceedings presented by the two acts under which the same may be had, as in the judgment provided for in each. See Digest, 1845, title "Attachment," secs. 12 and 13; same book, title "Execution," page 476, sec. 6.

By the 12th section of the attachment law, it is enacted that garnishees may be summoned by the sheriff to appear at the return term of the writ of attachment "to answer the interrogatories which may be exhibited by the plaintiff against him," and such is the form of the summons prescribed in favor of the execution creditor, and it is further expressly provided in behalf of the execution creditor, that "the like proceedings shall be had, and the like judgment rendered for or against the garnishee, as are or may be provided in cases of garnishees summoned in suits originating by attachments." Now I cannot well perceive how it can be maintained, (as it was decided by the circuit court in the case at bar) that when a party is summoned as garnishee, and answers that he has money in his hands, which belongs to the defendant in the execution, and which he holds to and for the defendant alone, that the money thus in the hands of the garnishee, and to which he has no right, and claims none, being the money of the defendant, should be less liable to satisfy, in this proceeding, the debt of the plaintiff, than would be the same amount of money in his hands, as a debtor of the defendant in the execution. There is no reason for any such distinction, and there can be none; especially when we contemplate the object which the legislature had in view in enacting the law and the true nature of the proceeding as a remedy. As a remedy, it is a suit by the creditor against a person who is a debtor of his, the plaintiff's debtor. It cannot be viewed or considered in any other light. By it, the person garnisheed is summoned and made a party to that part of the creditor's case, which is in progress under his execution, and being summoned, the law gives him the same right to defend himself against the creditor's allegations, in regard to his having money of the defendant in his possession, that he would have against the debtor in the execution, if sued by him; and of this proceeding, the defendant, being a party to the execution, has notice and is bound by it; so that no injury can result to either of the debtors, and the plaintiff will thus obtain his debt out of that which could not otherwise be had, and the object and meaning of the law, will, as a remedy, be carried out.

LEONARD, for defendant in error.

A special deposite of coin does not constitute a depository a debtor, within the meaning of our attachment laws, so as to subject him, in respect to the deposite to a garnishment upon execution against depositor. Rev. Statutes of 1845, title "Execution," p. 476, sec. 6.

NAPTON, J., delivered the opinion of the court.

We concur, in this case, in the construction which the circuit court gave to the 6th section of our act concerning executions. We do not understand that under this section a person having possession of property of the defendant in the execution can be garnisheed. That section is confined to debtors of the defendant, and in this respect is more

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limited in its operation than the corresponding section of the attachment law.

No necessity is perceived for giving this statute a more enlarged construction. Gold and silver coin are subject to be seized on execution, like any other property not exempted by law, and the same vigilance which enables the creditor to garnishee the person in whose possession it happens to be found, would enable him to levy directly upon the money. So also it could be reached by attachment, if the case in other respects authorized one.

If the garnishee, in this case, had been the depository of a horse, or other chattel, than the gold coin belonging to the defendant, it could hardly admit an argument that such a depository was not a debtor of the defendant within the meaning of the act. The principle is not changed by the fact that the property was current gold coin, since an execution reaches it under our law.

The only question is, was Edgar, the garnishee, a debtor of Collins, the defendant? He had received from Collins one thousand dollars in American gold, with directions as to the disposition of it. He was in no sense a debtor to Collins. He had not in any way rendered himself liable to any action by Collins, or any of Collins' creditors. He held the property or money, so far as it appears, merely as a deposit—expecting to derive no benefit in any form and to incur no liability by reason of its being in his possession. He had been merely passive and had done nothing to subject himself to responsibility. If the property was the property of Collins, there was nothing to obstruct the levy of an execution by Collins' creditors. Why, then, give any latitudinous construction to the execution law, so as to inflict costs upon the garnishee, when nothing is to be gained even for the creditors? He has simply mistaken his remedy. Judgment affirmed.

VIVION vs. LAFAYETTE COUNTY.

The action of the circuit court in giving or refusing instructions will not be reviewed by the supreme court, unless it be assigned in a motion for new trial.

APPEAL from Lafayette Circuit Court.

HAYDEN, for appellant.

LEONARD, for appellee.

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1. The neglect of the county court to take a real estate mortgage for the better security of the money loaned is no discharge of the securities from their liability. *Ames & Bank vs. Root and others*, 2 Metcalf Rep., 840; *United States vs. Kirkpatrick*, 9 Wheat. Rep.; *United States vs. Vanzandt*, 11 Wheat. Rep., 184; *United States vs. Nichol*, 12 Wheat. Rep., 505; *Dox and another vs. United States*, 1 Peters Rep., 318; *The People vs. Russell*, 4 Wendall Rep., 371.

2. The omission to sue within thirty days after the receipt of Aull's notice did not discharge Vivion from his liability, because:

First. It is not a requisition within the meaning of the statute. *Cope vs. Smith*, 8 Serg. and Rawl. 110, 120; *Gardiner vs. Ferry*, 15 Serg. and Rawl. 117; *Erie Bank vs. Gibson*, 1 Watts Rep., 143; *Wilson vs. Glover*, 3 Barr's Rep., 408; *Parish vs. Gray*, 1 Humph. Rep., 88 (cited in 2 U. States Digest, p. 820, case 159.)

Secund. If it be a sufficient notice, the effect is to discharge the security who gave the notice, and it does not discharge the other sureties who did not join in it.

3. The ruling of the circuit court as to the law of the case was not put into the motion for a new trial, and therefore, according to the settled law of this court, the propriety of the instructions given and refused, cannot be reviewed here.

Judge BIRCH, delivered the opinion of the court.

This was a petition in debt against Vivion, on a bond of B. F. Yantis as principal, and John B. Vivion and James Aull, as securities, made on the 7th day of February, 1840, and payable to Lafayette county with interest.

It appeared upon trial, that about the date of the bond, Yantis borrowed of the county four hundred dollars of the school fund, and, with the other obligors as his securities, executed the note sued on. No mortgage security was given, as required by law, for reasons not necessary here to be stated.

On the second day of November, 1847, Robert Aull, who was the administrator upon the estate of James Aull, caused a written notice, addressed to W. H. Russell, who was the treasurer of the county, to be delivered to the county court, then in session, to the effect "that the estate of James Aull would no longer be held responsible as security on said note."

Upon this state of facts, the court below declared the law to be, that neither the omission to take mortgage security of the borrower, nor the omission to sue within thirty days after the receipt of Aull's notice discharged Vivion, (the other security,) and judgment was given against him accordingly.

We have considered it unnecessary to look into the numerous authorities which are referred to in support of the rulings of the judge below, inasmuch as the third and last point which has been made by

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the counsel for the county is deemed to be properly predicated upon numerous and recent adjudications of this court in analagous cases.

The judgment of the circuit court is therefore affirmed.

WARNER vs. MORIN,

The supreme court will not consider any thing as a ground for reviewing a proceeding or judgment of the circuit court which has not been finally passed upon by that court, either in a motion for a new trial, if the alleged error has relation to proceedings during the trial, or in arrest of judgment of relating to the pleadings.

APPEAL from Clinton Circuit Court.

Judge BIRCH, delivered the opinion of the court.

It is unnecessary to further state the nature or condition of this case, than that as the counsel for the appellee has made the point so often passed upon by this court, its judgment must be rendered accordingly. Our jurisdiction of the case being appellate, (purely,) we are of course unauthorized to consider anything as a ground for reviewing a proceeding or a judgment here, which was not brought properly to the notice, and hence not finally passed upon by the court below, either in the motion for a new trial, if the alleged errors have relation to proceedings during the trial, or in arrest of judgment if going to the pleadings.

The judgment of the court below is therefore left unreviewed, and consequently affirmed.

TORNEY vs. THE STATE.

Every distinct act of betting upon any gambling device, even at the same sitting, is an offence for which the person is liable to indictment and fine.

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APPEAL from Texas Circuit Court.

ROBARDS, Attorney General, for the State.

1. The evidence in the case fully warrants the verdict of the jury.
2. The instructions given to the jury by the court, at the instance of the State, contained a correct exposition of the law applicable to the facts.
3. The instructions asked by the defendant and refused does not assert a correct legal principle.
4. The record offered by the defendant, to establish a former conviction, was insufficient, of itself, for that purpose. It only shows that there was another indictment against the defendants for gaming, found at the same term, upon which he was tried and convicted. It should be proved that each indictment is for the very same specific offence. The offence charged is betting, not the playing at cards. Each bet constitutes an offence and for which a person may be indicted. If a person should bet one hundred times during the twelve months previous to the finding of an indictment, according to the instruction asked by the defendant, if he should be convicted for one act of betting, it releases him from all the balance, though there be an indictment pending for each. 12 Mo. R. 393.

RYLAND, J., delivered the opinion of the court.

The plaintiff in error, defendant below, was indicted in the Texas circuit court at October term, in the year 1848, for betting on a game of cards, a sum of money, to-wit: one dollar. This indictment was returned into court on the 27th day of October, 1848.

A trial was had at the November term of said court, 1849, when the following facts were proved. A witness stated, that on the night of the first day of the October term of the Texas circuit court, 1848, he saw the defendant below bet on a game of cards, and bet perhaps as many as fifty times, at Houston, the county seat of said county, at one setting. The circuit attorney then introduced the records of said court, showing the date of the return of the bill of indictment into court, to-wit: the 27th of October, 1848.

The defendant then introduced the following record of the said Texas circuit court.

"In the Texas circuit court, on the second day of the November term, A. D., 1849.

State of Missouri
vs.
Robert Torney.

} Indictment for gaming, returned by
the Grand Jury,

27th October, 1848, "a true bill."

JOHN T. FOURT,

Foreman of the Grand Jury.

Now, at this day comes the circuit attorney on the part of the State, and the said defendant, who says he is not guilty in manner and form as

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charged against him in said indictment, and therefore came a jury, to-wit: twelve good and lawful men, who being duly empanelled, tried and sworn, to try the issue, upon their oaths, do say that they find the defendant guilty in manner and form as charged against him in said indictment, and assess his fine at ten dollars—it is therefore considered by the court, that the said State of Missouri have and recover of the said defendant, as well the sum of ten dollars so assessed against him, as her costs and charges by her about her suit in this behalf laid out and expended, and that execution issue therefor.”

The court then, at the instance of the prosecuting attorney, gave the following instructions, viz:

“1st. The court will instruct the jury, that if they find from the testimony, that defendant bet any amount of money on a game of cards, within twelve months next before the 26th day of October, 1848, they will find the defendant guilty.”

“2. That every act of betting, even at the same sitting, is a distinct offence, for which the defendant is liable to indictment and fine”—and refused to give the following instruction for the defendant:

“The court instructs the jury that if they believe from the evidence that defendant has been convicted of the offence of betting on a game of cards, on an indictment embracing the same year, in same county, of the one on which defendant is now being tried, that they must acquit.”

The defendant excepted to the opinion of the court in giving the above instructions for the State, and in refusing the one for the defendant. The jury then found the defendant guilty, and assessed his fine at ten dollars. Judgment was rendered on the verdict against the defendant. He then moved for a new trial, assigning as reasons therefor, the insufficiency of the evidence to support the charge in the indictment, and the giving improper instructions for the State, and refusing to give proper instructions for the defendant. The court overruled this motion for a new trial, and the defendant below brings the case before this court.

This indictment is found upon a violation of the 8th article of our statute, concerning “Crimes and Punishments”—Rev. Code, 1845. This section declares that “every person who shall bet any money upon any gaming table, bank or device, prohibited by the preceding section, or at or upon any other gambling device, or who shall bet upon any game, played at or by means of any such gaming table, or other gambling device, shall on conviction be adjudged guilty of a misdemeanor, and punished by fine not exceeding twenty-five dollars, nor less than ten dollars.”

Powell vs. Gott.

Under this section, to bet any money or property upon a game of cards, or upon any other gambling device, is a misdemeanor, and has always been so held by our courts. Every betting is an offence, and is liable to indictment and fine. The instructions, then, given by the court below for the State, are correct. The defendant endeavored by his evidence to show a former conviction, and so far as it (the evidence) has this tendency it was proper enough. But it did not warrant the instruction which he asked the court to give the jury. It fails utterly to prove that he was even tried or convicted for the very offence, the identical betting for which he had been indicted and for which he was then upon trial. He had no doubt been convicted for betting at cards and fined ten dollars, and the indictment upon which this conviction was had, was no doubt found at the October Term of Texas circuit court in the year 1848; at the same term at which the indictment on which he was then being tried, had been also found. But surely this did not prove that he had ever before been convicted for the identical offence, the same betting for which he was then on trial.

But the defendant seemed to think that if he should be indicted and convicted, and fined for betting money at a game of cards, at any time within twelve months, that this conviction would be a full license for him to bet money at a game of cards every day within the aforesaid term of twelve months. That there could be but one conviction for gaming against him, within any period of twelve months; and his instruction is based upon this notion, the absurdity of which is too palpable to need any comment.

Whenever the defendant relies upon a former conviction, he must show it to be for the very same offence for which he is then on trial.

In looking into the proceedings of the court below in this case, I find no error committed for which the defendant below has any cause of complaint. I am therefore in favor of affirming the judgment, and such being the opinion of my brother Judges, the judgment of the Texas circuit court is affirmed.

POWELL vs. GOTT.

1. The statutes of this State have fixed no limitation to writs of error *coram nobis*; the writs barred by the statute are those only which are brought to correct errors of law.

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2. If a judgment be rendered against an infant defendant who *appears by attorney*, he may at any time after he arrives at full age set the same aside, upon motion.

ERROR to Montgomery Circuit Court.

BUCKNER, for plaintiff in error.

1. The first question presented for the decision of the court is, whether this proceeding by motion is barred by the 8th section, 7th art. Practice at Law, page 831. The appearance of an infant by attorney is more than an irregularity—it is error in fact. This section only bars proceedings by motion for irregularity. Irregularity is the transgressing of form or rule of procedure, (1 Tidd Pr. 561; 1 Duer & Paine Pr. 365; Jacob's Law Dict.,) "it is the want of adherence to some rule or mode of proceeding, either in omitting what is necessary to be done, or in doing it at an unseasonable time, or in an improper manner." Here, though a rule of practice has been transgressed, that rule has its foundation in principles of law of a substantial character. The infant has no legal capacity to employ an attorney, or to make a warrant of attorney. His letter of attorney is absolutely void, and not only voidable. It is therefore error in matter of substance, as well as a departure from the rules of practice. That it is error see the following authorities—Knapp vs. Crosby, 1 Mass. R; Arnold vs. Sandford, 14 Johns. R. 416; Mockey vs. Grey, 2 Johns. p. 192; 1 Tidd Pr. 1056, 1107; Jeffrey vs. Robideaux, 3 Mo. R. 25; 8 Co. 58, Bacon Infancy and Age, 617, 618.

2. The question of affirmance or disaffirmance of this avoidable act, does not arise in this case; and if it does, the evidence is conclusive on the point, that after reaching his full age, the plaintiff at all times was preparing to resist the enforcement of the defendant's claim, and did make actual resistance so soon as defendant began to assert his right. The court is referred to the case of Tucker vs. Moreland, 10 Peters; Clamorgan vs. Lane, 9 Mo. R. 447, for the law as expounded by this court, on the subject of the affirmance or disaffirmance of a voidable act of an infant. The record shows that Gott had purchased the land of the plaintiff, on execution upon his judgment, and had commenced, in 1847, a proceeding to have partition of the land bought, making W. L. Powell defendant, and as soon as this was done, the plaintiff in error employed counsel to appear for him and set aside the first judgment. At all events, there is no act of affirmance shown on the part of the plaintiff in error.

3. It was contended below that the plaintiff in error could not take advantage of this erroneous judgment, *post plenum ac uatem*, and that the question of nonage must be tried by inspection. For this position, 2 Kent 237, and Bacon Abr. Tit. "Infancy and Age," and other like authorities, are referred to. These authorities lay down the doctrine that matters of record, such as fines and recoveries, recognizances, statutes merchant and staple, must be avoided during minority. These authorities and this principle, I insist, do not apply to this case. The examples given are either modes of assurance of real estate, or matters of record when the parties appear in person and the question of infancy is passed upon, and therefore is a judicial act. In fines and recoveries, it was expressly required by statute that the courts should see that recognizers should not be under disabilities, so that this matter must have been, in all cases, adjudicated by the courts. But where the parties appeared by attorney, the infant could avoid his act after fullage, and the matter be tried *per pais*, (Jacobs' Dict. Infant, 3 Bacon Abr. 584, 597.

The appointment of an attorney is not a judicial act, like that of a guardian, and here lies the distinction. The question of nonage did not come before the court; and as presented to the court now, it is a simple question of fact, and that is, whether at the time of appearance, by attorney, the plaintiff was an infant. In the case of Arnold vs. Sandford, 14 John. and 2 Rand. 174, the same question as now presented was before the court, and the objection urged below was not suggested, either by counsel or court. In Slian vs. Shelback, 1 Dall. 165, and

Powell vs. Gott.

Moore vs. McEwen, 5 Serg. & Rawl. 373, this objection was urged but overruled, and the distinction, above insisted on, recognised. In the former of these cases the court say that this principle does not apply except to the old actions for conveying and assuring real estate.

PORTER, for defendant in error.

1. The said motion was properly overruled, because it did not appear to the court that Powell sought to get rid of Gott's judgment against him, on the ground of his infancy, and of a guardian not having been appointed for him, at or before the trial of the action of trespass in which judgment was rendered against him. He had expressed his determination that Gott should not have his land, and had authorised an agent to employ counsel to defend Gott's suit for partition of the same, but had not authorized any notice to set aside or vacate the judgment, and the motion should have appeared to have been made with his consent or approbation. Vide 3 vol. Stephen's Nisi Prius, title "Infant."

2. The motion to set aside the judgment should have been made expressly for the reason that the infant had appearance upon the record by attorney, and not by guardian, which motion should have been verified by the affidavit of said Powell, or at least by some one authorised to act in his behalf in the premises, which was not the case.

3. A judgment or other judicial proceedings against an infant, without the appointment of a guardian, are good and valid till reversed. They are voidable at most, and must be avoided in the time and manner prescribed by law. Vide Jeffries vs. Robideaux, 3 vol. Mo. Rep. p. 24; also, 1 Pirtle's Digest; Tit. Infant Infancy, p. 521, and cases there cited—and if not so avoided, or if any, even slight acts *in pais*, in affirmation, are done or suffered, after the infant attains his majority, the voidable act or proceeding is affirmed. In this case, no effort to set aside the judgment of Gott was made or attempted by Powell, or any one in his behalf, till more than two years after, according to his mother's evidence, he had attained his majority.

4. It is not pretended by plaintiff in error, that he was not liable in the suit of trespass against him; nor that he was not legally and properly defended—indeed, it appears by the evidence of his mother, his natural guardian, that he was so defended by counsel employed by herself as well as by a volunteer attorney. The only error complained of on the motion is, that the circuit court omitted the formality of appointing a guardian *ad litem* on the trial; and for this omission defendant in error submits that the motion should have been made within five years after the rendition of the judgment, and not after, and cites Art. 7, sec. 8, title "Practice at Law," Rev. Statutes. The motion in question was not filed till after the expiration of that period, and there being no saving in favor of infants, or others laboring under disability, the said irregularity is cured.

5. The motion in this case, admitting that the same was properly made and authenticated, which defendant denies, is a proceeding of *error coram nobis*—vide Jacobs' Law Dictionary, Tit. Infant, ch. 3—and analagous to a writ of error from a superior to an inferior court; and all writs of error are required to be brought within five years after the rendition of the judgment or decision from which they are taken, and not thereafter—vide sec. 3 Practice in Supreme Court, Rev. Statutes, p. 901—and this, defendant insists, is sufficient to sustain the decision of the circuit court in dismissing the motion.

NAPTON, J., delivered the opinion of the court.

This was a motion to set aside a judgment obtained against an infant who appeared by attorney. The judgment was rendered in 1841, and the motion was made in 1847, about two years after the defendant attained his majority. The motion was supported by several affidavits,

both of the petitioners and others of his family to establish the truth of the facts stated therein.

The motion was overruled by the circuit court.

This is in the nature of a writ of error *coram nobis*. The object of this motion is to correct an error in fact, upon which certain proceedings in law have been based.

The objections taken to the motion here, are first, that the motion came too late, having been made after the infant attained his full age; second, that our statute of limitations upon writs of error and the 8th section of the 7th article of the act concerning Practice at Law, constitute a bar from lapse of time.

The section above referred to provides, that "judgments in any court of record shall not be set aside for irregularity, on motion, unless such motion be made within five years after the term such judgment was rendered."

This section we deem inapplicable to the present motion, for the reason, that the entering of a judgment against an infant is not an irregularity, but an error. (*Ex parte Toney*, 11 Mo. R. 663.) Nor do we think the limitation of five years, fixed by our statute which regulates writs of error to the supreme court, applicable, because the error complained of here is not one of law, but of fact. The whole of our act regulating the practice in the supreme court, and writs of error generally, most manifestly is intended to apply to writs brought to correct errors of law. There is no limitation to be found in our statute book to a writ of error *coram nobis*—or a proceeding to correct a judgment of law founded upon an error of fact. The rare occurrence of such proceedings has doubtless caused them to be overlooked by the legislature. The courts have no power to supply the omission.

The first objection is not tenable. The old rule for setting aside fines and recoveries, on account of the infancy of the party levying the fine or suffering the recovery, is not at all analagous to the present case. These were kinds of record conveyances, equivalent to judgment—and the question of infancy was passed upon by the courts, when they permitted the fines or recoveries to be had. The judges were specially directed by the act of Parliament, under which these proceedings were had, to see that the party appearing and acknowledging the fine was of full age. But in the present case, the party appeared by attorney in the usual way, and the fact of infancy was not passed upon. It was assumed that the party was of full age, and the whole proceeding was based upon that assumption. It is now asserted that the fact was otherwise, and there is nothing on record to debar the defendant from so asserting. Judgment reversed and cause remanded.

Hall vs. Woodson, adm'r of Scott.

HALL vs. WOODSON ADM'R OF SCOTT.

1. Where the circuit court upon the last day of the term refused to enter upon the trial of a jury cause, and continued it, it is a discretion which the supreme court will not interfere with, if it is manifest that the party complaining sustained no injury.
2. Where the plaintiff paid money, in another State, for the use of the defendant, the jury may give the plaintiff interest according to the law of this State unless the defendant shows that the rate of interest in the State where the liability occurred is less.

APPEAL from Jackson Circuit Court.

HAYDEN, for appellant.

ROBARDS, for appellee.

1. This court will not reverse the judgment of the circuit court because he granted a continuance to the plaintiff, at the March term, 1847. The oral affidavit made by consent on the last day of the term is not set forth. This court cannot undertake to say that the court committed such error, if any, in this as would justify a reversal of the final judgment. The cause, by consent, or at least without objection, was postponed until it was too late in the term to try it. The result of this course shows that the plaintiff had a good cause of action against the defendant, although the plaintiff did not show himself entitled to a continuance by bringing himself within the strict letter of the law; yet, it was a mere naked advantage, not calculated to secure to the defendant any right but to postpone the payment of a just debt. The defendant has lost nothing by the continuance. He had no witnesses—he never claimed that he had any whose testimony might be or was lost to him by the continuance. It is evident that the failure of the plaintiff to be in readiness for trial was for want of evidence—that sufficient diligence had not been used by him in procuring it: for this negligence he paid the costs of the continuance. Now, if it could appear manifest to this court, that the continuance caused an injury to the defendant, by a loss or deprivation of such evidence upon the trial as would have prevented the plaintiff from recovering judgment, then, I admit that it would be the duty of this court to prevent the negligence of the plaintiff in procuring his evidence, from working a hardship—a positive injury upon the defendant. But no such state of things appears to this court. It does not appear to this court that he suffered any thing except a delay in the trial of the cause. Suppose this court determines that plaintiff ought not to have had a continuance, will the suit be dismissed with the record before it which shows that he has a good cause of action, and upon which he has obtained a judgment, and put the plaintiff to a new suit to recover his debt? This would look more like increasing litigation than settling matters of legal controversy. I hold that it is not every error of the circuit court that will justify a reversal of its judgment by the supreme court. It is only such errors as operate hardships; prejudice rights, will justify the setting aside of judgments. Motions for continuance are addressed to the sound discretion of the court, and the supreme court will consider that discretion soundly exercised unless the record shows it otherwise. 3 Mo. Rep. 123; 5 Mo. Rep. 51, 519, 522; 8 Mo. Rep. 606.

2. The evidence fully sustains the verdict of the jury. There was no necessity to prove payment of the money by plaintiff, because defendant, when he was applied to for payment of the debt, expressly acknowledged the justness of the debt or part of it, and promised to pay the balance. This is sufficient to sustain plaintiff's action, and if he had really any off set, it was his duty to establish it.

3. The allowing of interest by the jury, at the rate of six per centum per annum, upon the

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amount paid by the plaintiff was right and proper. If they were satisfied that the plaintiff paid the money, it was right that he should have interest upon it. The payment was made for the benefit of the defendant, and immediately became his debt and the withholding of it should be at the expense of legal interest. The verdict is for damages, and it is a discretion which juries have in such cases, in determining the damages sustained by the plaintiff, to allow interest as part of the damage. 1 Johnson Rep. 315; 1 Pickering, 118; 9 Pickering, 368; 1 Missouri Rep. 718; 4 Metcalf, 203.

Judge BIRCH, delivered the opinion of the court.

As the only points upon which the proceedings in this cause can properly be reviewed in this court, are those which were relied upon and presented in the court below in the motion for a new trial, the statement of the case need not, of course, extend beyond such of the facts belonging to it as apply to the points alluded to.

Those points were, that the circuit judge improperly granted the plaintiff a continuance, and that the jury found their verdict contrary to the evidence.

In relation to the first point, the material facts embodied in the bill of exceptions are, that when the cause was called for trial, on the fifth day of the September term of the circuit court in the year, 1846, the plaintiff having moved for a continuance, and the defendant at first requiring a written affidavit, the court gave time until the next morning to prepare and file one. It seems, however, that the parties subsequently agreed that a verbal oath might suffice in behalf of the application, if made on that day, but that no such oath was then made, nor was any affidavit filed on next day, or subsequently during the term; and the court proceeded on the morning of the sixth day to the trial of several other causes, which were set on the docket after the cause in question on the afternoon of the same day, the cause was again called, and the plaintiff again moved for a continuance, it having been again agreed that the reasons might be stated orally, under oath. The plaintiff being thereupon sworn, and rendering no sufficient reason for the continuance prayed for, and the defendant insisting upon a trial, the court nevertheless continued the cause, and proceeded with the docket, alleging as a reason for it, that as the plaintiff demanded that his case should be tried by a jury, the court would entertain no such causes on the afternoon of Saturday.

As the *applicant* for the continuance rendered no sufficient reason for it, the whole question concerns the competency of the *court* to continue it for the reason it has itself assigned.

That the circuit judges should possess some discretion in reference to the management and disposition of the business before them need not,

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of course, be here argued. Such a discretion is often absolutely *necessary*, and consequently inherent, unless specifically inhibited, which is not pretended in the argument before us. We can well enough imagine, also, that the condition of the docket in this case may have suggested and justified a conformity to the greater necessity and propriety which existed for the more summary disposition of a number of cases less contested, where no jury was required, and where it might well enough have been imputed as a virtual delay of justice not to have heard them and rendered judgments. We feel consequently unauthorized from the record before us to impugn or otherwise question the discretion which seems to have been exercised by the court below—particularly as it is not pretended by the defendant that he was subsequently, upon the final trial, in any respect prejudiced or injured for the want of the testimony of witnesses which he had ready at the time of the continuance.

The second and only additional reason assigned below why this cause should be tried anew was, that the verdict of the jury was against the evidence—it being alleged in the motion that there was no testimony that the plaintiff's decedent ever paid the money sued for, for the defendant, and that even if he did, there was no evidence that by the laws of Kentucky, where it was alleged to have been paid, any interest would be allowed (as the jury allowed in this case) on such a payment.

We apprehend the preponderance of authority in such cases to be, that unless the defendant shows that the rate of interest in the State where the liability occurred is *less* than it is in the State where the remedy has to be sought, the jury will be justified in computing it according to the laws of the forum. As to the general proposition, it was determined in the case of *Pease vs. Baber*, (3 Caines, 266,) and has been since followed in all the American leading cases, that whether interest will be allowed at all or not, must depend upon the circumstances of the case—each one depending upon the justice and equity arising out of the peculiar circumstances. We apprehend it will scarcely be doubted that this is a case in which the defendant, if liable at all, is so liable, *ex aequo et bono*, to refund the interest as well as the principal.

Concerning the alleged misfinding of the jury upon the main point, as there was evidence from which they might find as they did, their province must of course, remain unsurped by this court, particularly after the judge who tried the cause, and who consequently heard the testimony, has declined to interfere.

The judgment of the circuit court is therefore affirmed.

Judges NAPTON and RYLAND, concurring—holding that the granting a continuance was not a matter of error.

Huntsman vs. Rutherford et al.

HUNTSMAN vs. RUTHERFORD ET AL.

Where the instructions given by the circuit court properly put the questions presented by the evidence before the jury, the refusal of others is not sufficient ground for reversing the judgment.

ERROR to Randolph Circuit Court.

STATEMENT OF THE CASE.

The plaintiff in error instituted a suit before a justice of the peace, in Randolph county, against the defendants, and obtained a judgment for about four dollars, from which the defendants took an appeal to the circuit court. In the circuit court the defendants obtained a judgment, and the plaintiff has brought the case here by writ of error.

The facts of the case, preserved in the bill of exceptions, seems to be in substance, that the plaintiff sued upon a note that the defendants claimed to have paid off before the commencement of the suit, and also filed before the justice an off set for various articles furnished the plaintiff. There is a large amount of evidence relating to the off-set and payments made on the note sued upon; and also evidence tending to show a statement between the parties, and that, in that settlement, the balance was struck and the note given. There is also evidence, that at the time of the settlement, interest was calculated on a previous debt due the plaintiff from the defendant, at twenty-five per centum per annum, and that such interest, at that rate thus calculated, was added into and formed a part of the note sued on in this case. The evidence in the case is too voluminous to be incorporated in this statement, but by reference to the bill of exceptions, it will be seen to embrace the above points of enquiry.

Upon the above state of evidence, the plaintiff moved several instructions, all of which were refused but one, which was overlooked by the court, and was neither given nor refused, but the principle contained in it was advanced to the jury, by the plaintiff's counsel, by permission of the court. The court gave the jury one instruction for the defendants in the following words:

"If the jury believe from the evidence, that the defendants have paid plaintiff all the principal and legal interest on the contract, and that the note was executed for a balance on said land, they will find for the defendant, notwithstanding there may be a balance on said note"

PREWITT, for plaintiffs in error.

The land was not originally purchased for the defendants, or either of them, or at their request. Plaintiff had a right to adopt any mode of calculation he pleased to ascertain what he would sell the land at. He did not sell them the land until the note was given; they were not bound to pay him any money until then, and consequently, there could have been no forbearance on which usury would arise.

The first and second instructions asked by plaintiff, were justified by the evidence, and ought to have been given. The third and fourth ought certainly to have been given, for they stated the law hypothetically on a case which the evidence authorised to be put to the issue.

The instruction given for the defendant is bad, because it assumes as a fact, that previous

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to the execution of the note, there was a subsisting usurious contract, which ought at least to have been left to the jury.

There must have been a corrupt intention, to take more than legal interest for forbearance, for money due from defendants to plaintiff, to make the consideration of the note usurious. *Tardenan vs. Smith*, Hardin Rep. 175, 8 Conn. 52, *Potter vs. Yale College*.

CLARK, for defendant in error.

It is insisted by the defendants, that the judgment of the circuit court ought to be affirmed. The only question involved is, whether the plea of usury set up here, can avail under the evidence as found in the bill of exceptions. If it can, as is insisted, and the amount of the principal and legal interest was paid, the judgment was for the right party in the circuit court, and ought to be sustained by this court.

RYLAND, Judge, delivered the opinion of the court.

From the above statement, the only points for our adjudication involve the propriety of the action of the lower court, in refusing and in giving the instructions asked for.

The instruction given for the defendant properly put the question of usury before the jury; and the evidence, as preserved by the bill of exceptions, fully warranted this instruction. The plaintiff below, who was introduced by the defendants as a witness, fully proves that on one hundred dollars of the original debt he charged twenty-five per cent.; and that, when the settlement was made, and the notice given by defendants to him, he compounded the interest, and took the note now in suit for the balance. The questions of usurious interest was left to the jury; and from the credits on the note, which was for the sum of one hundred and eighteen dollars and twenty-five cents, originally given on the settlement, I find that the plaintiff had received at various times the sum of one hundred and seventeen dollars and ninety-two cents, before he sued on this note.

The object of the plaintiff below, by his instructions which he prayed the court to give the jury, was to exclude the idea of usury from the jury, because the parties had once made the settlement. The court did right in refusing these instructions. The 4th instruction, as marked on the record, it seems, was overlooked at the time by the court; it was neither given nor refused. The attention of the court was not directed to it. We therefore presume it was of no great importance, and shall pass it by.

The instructions which the court gave for the defendants, and which is set forth in the above statement of this case, called the attention of the jury to the fact of the full payment of principal and interest—that

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is legal interest; and if the jury should believe from the evidence, that the defendants had paid the plaintiff the principal and legal interest, although there still appeared by the note something yet unpaid, that they should find for the defendants. The jury did find for the defendants. I cannot see how they could have done otherwise.

From the whole proceedings in the case, the plaintiff has no just cause of complaint. He ought to be satisfied. The jury, before the justice of the peace, found for him only four dollars by their verdict; and the jury, in the circuit court, after hearing his own statement, found against him. The circuit court refused to set aside the finding and grant a new trial, and I am unwilling to reverse the judgment, nothing appearing on the record to authorise such action.

The judgment below is affirmed.

 EXPARTE FEARLE & LEWIS.

A sheriff having in his hands an execution against A, and having received money for him under an execution in which he was plaintiff, although the money before being paid over to A cannot be levied upon, the court may direct it to be paid over upon the execution against him, unless the legal and equitable right to it has passed to some third person.

ERROR to Chariton Circuit Court.

TURNER, for plaintiff in error.

1. The title to the \$100 collected by the sheriff on the execution in favor of Spicer, on the same day the judgment was assigned to Shephard, even assuming that the collection was made before the assignment, did not vest in Spicer, so as to subject it to a levy under an execution against him. *Turner vs. Fendall*, 1 Cranch, 117; *First vs. Miller*, 4 Bibb, 311; *Jones vs. Ramsey*, 2 Richardson's R. 4. And therefore Shephard took the judgment unencumbered by any lien, and was entitled to the proceeds of the execution issued thereon, and the court erred in ordering a portion of such proceeds to be paid to Fearle & Lewis.

2. Had Fearle & Lewis' execution been a lien on said money, the lien would have expired on the return day of the execution without a levy. *Fall vs. Harris*, 4 Bibb, 532; and Shephard would then have acquired a perfect and unencumbered right to said money.

3. Had said money been subject to a levy, under Fearle & Lewis' execution, the sheriff should have levied upon it while that execution was in force; but having failed to do so, and having returned the money into court, the only control the court had over it, was to direct the officer to pay it over to Spicer's assignee. It was not the province of the court to distribute the money amongst the creditors of Spicer, even had not the intervening equity of Shep-

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hard forbid it. Any other creditor of Spicer had as good a right to the money as had Fearle & Lewis, at least after their execution expired without a levy.

4. A writ of error lies in this case. *Wise vs. Darby*, 9 Mo. R. 131.

5. A motion for a new trial was unnecessary; the reason of the rule requiring such motion, in certain cases, not applying where the error complained of is committed on a point raised and directly decided in the circuit court, on a motion addressed to the court, as in this case. The judgment is a "final judgment," within the meaning of the statute, and could not be rendered more so by the courts' repeating its decision a second or third time on a motion for a new trial. See *West, assignee, vs. Miles*, 9 Mo. R. 168. The case of *Higgins vs. Breen*, (ib. 497) is not in point, even if incontrovertibly correct, the judgment in that case being on a *verdict*. But the reasoning of Judge Napton, in his dissenting opinion delivered in that case, is in point.

DAVIS & SHACKLEFORD, for defendants in error.

The court may, in its discretion, direct money taken under an execution, which money is in the hands of a sheriff, or brought into court, to be paid over in satisfaction of another execution, in the hands of the same sheriff, against the plaintiff in the first execution; and if a third person claims the money, by virtue of an assignment of the judgment, the court is the proper judge as to whether the assignment is void and made to defraud creditors, and may disregard it. See *Steel vs. Brown*, 2 Vir. Cases, 246; *Means vs. Vance*, 1 Bailey Rep. 39.

It will be observed that in this case, the record is made out in a confused manner, but there is a sufficiency of evidence to show that the court did right in ordering the money paid over to Fearle & Lewis.

It is quite clear, that Spicer never really sold his judgment to Shephard—that all that is but an attempt to cover fraudulent the money of Spicer from his creditors, Fearle & Lewis.

It will be seen by the record that the two executions of Fearle & Lewis, and that of Spicer, all came into the hands of the sheriff on the same day—that on the morning of the next day, the sheriff collected the \$100 from Chapman, and that, on the same day, this pretended assignment bears date.

We insist for Fearle and Lewis, that the court had a right to order the money paid over to them, even if there was no fraud in the pretended sale; as, in point of time, the right of Fearle and Lewis attached to the money before the assignment was attempted to Shephard.

But the pretended sale of the judgment will appear to be one of the most shallow devices and artless pretexts at fraud ever proved in court.

NAPTON, J., delivered the opinion of the court.

The opinion of the circuit court, in ordering the sum of one hundred dollars to be paid over to Fearle and Lewis, seems to have been based upon the fact that this sum was paid to the sheriff on the same day on which the assignment to Shephard was made, and that, consequently, the lien of the execution attached before the assignment could transfer the property. We presume, that if the assignment had been held void, because of fraud, the court would have directed the entire amount of the execution to have been paid over.

The case of *Turner vs. Tindall* (1 Cranch. 42) seems to hold the doctrine, that money in the hands of the officer is not subject to levy,

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as it is in the custody of the law, and not the property of the plaintiff in the execution. Judge Marshall, however, observes that it is the duty of the officer to seize it the moment it is paid over into the hands of the creditor, and as the payment, under these circumstances, would be a vain ceremony, no court would hesitate to justify the payment in satisfaction of the second execution, or if the money was brought into court, to direct it to be so paid, unless the legal and equitable right was in some third person.

The officer did right, we think, in waiting for the directions of the court, and the court was clearly authorized to direct the whole amount to be paid over unless the assignee, Shephard, had a legal and equitable right to such proceeds. Who then is to decide this? No jury was demanded in this case and the court was called upon to determine the motion.

If the court had ordered the entire amount of the execution of the plaintiff to have been first paid, we should not have considered such order erroneous.

What were the facts? After an execution from a justice had been returned nulla bona, and the transcript was filed in the circuit court, and an execution put in the hands of the sheriff, and on the very same day when the defendant in the second execution had paid over to the sheriff one hundred dollars, the defendant, Spicer, who was insolvent as the return of the constable showed, assigns the judgment over to Shephard. No money is passed, but a previous indebtedness is pretended. If ever there was a fraud in law, a *prima facie* fraud, this would seem to be one.

But whether the assignment was fraudulent or not, if the property was in the hands of the law, and not the property of the plaintiff in the execution, and therefore not subject to be levied on, it ought surely to be held equally out of the reach of an assignment by the plaintiff in the execution. The only circumstance that kept the money from the plaintiff's execution was, that it was in the hands of the sheriff, and under our statute could not even be garnisheed. Shall the defendant in the execution, under these circumstances, be permitted to withdraw this amount from the operation of the execution and put it in the hands of even a bona fide creditor? If he can, it is a manifest injustice to the vigilant creditor. The law which is said to favor the vigilant would no longer do so.

We think the circuit court was right in disregarding the assignment so far as the execution creditor was concerned. As no complaint is made of the court because of limiting his order to the one hundred dollars, judgment is affirmed.

Chilton's Adm'r vs. Chapman.

CHILTON'S ADM'R. VS. CHAPMAN.

Plaintiff and defendant were bound as securities; plaintiff accepted a conveyance of property from the principal debtor, to indemnify him as security; the trustee, under the direction of plaintiff, sold the property for an amount sufficient to pay the debt, but never collected the money; plaintiff paid the security debt and brought assumpsit against the defendant for contribution. Held that the action could not be maintained.

ERROR to Chariton Circuit Court.

STATEMENT OF THE CASE.

The plaintiff's intestate instituted his action, in the Chariton circuit court, against the defendant, to recover from him one half of a debt the plaintiff had paid to the branch bank of Missouri, at Fayette, for the payment of which the plaintiff and defendant were securities of one Thomas Chilton, who was the principal debtor to the bank. There is but one count in the declaration for money had and received, for money paid, laid out and expended, for money lent and advanced, and for work and labor, care and diligence. The defendant made a defence, and upon a trial in the circuit court, the plaintiff took a non-suit and afterwards moved to set it aside, which was refused, a bill of exceptions taken and the case brought here by writ of error.

The following are, in substance the facts as presented in the bill of exceptions. The plaintiff, on the trial, introduced and read as evidence, the written statement of James A. Shirley, who proved "that a note was executed by Thomas Chilton, Charles A. Chapman and M. A. Chilton, to the bank of the State of Missouri for two hundred and fifty dollars, negotiable and payable at the branch of said bank, at Fayette, Nov. 15, 1845, in four months—that Chapman and M. A. Chilton, were each securities to said note—that one half the debt, interest and protest fees was paid to him by the agent of M. A. Chilton in Boonville, on the 29th of July, 1846, and that the credit on the note was made by him—that the amount was one hundred and twenty-nine dollars and fourteen cents—that the note was placed in the hands of the bank attorney, and was collected—that he had seen a deed of trust of record in Howard county, which was made to secure M. A. Chilton, one of the endorsers on said note above described, as he had understood from Mr. Chilton, and that it must relate to the note as none other was owing the bank by Thomas Chilton, and that he also knew it as he was then the clerk of the bank." The plaintiff then read the note referred to. The plaintiff then read a transcript of a judgment and execution thereon, obtained in the Cooper circuit court, showing that the note has been paid off by Mark A. Chilton—this was all the evidence given by the plaintiff.

The defendant, by consent of the plaintiff, then read to the jury a copy of a deed of trust executed by Thomas Chilton to Mark A. Chilton and others, to secure the payment of this debt. The defendant then introduced Owen Rawlins, who testified that about two years ago, Albert Silman and Charles Chilton, who assumed to act as agent for the plaintiff, requested the witness (who was the trustee in the deed) to close the deed. In accordance with said request, he requested the editor of a newspaper to advertise the land and negro mentioned in the deed for sale—that on the day set for the sale, the witness was informed the notice was not legal, and under advice of Mr. Leonard and Charles Chilton, the land and negro were advertised again for sale—the notice was put in the paper by Charles Chilton—that on the day of sale, one John D. Thompson bid off the land for two hundred dollars, and the negro for eighty dollars; both were sold subject to all incumbrances—that Thompson represented that he bid

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them off for Silman—that on the same day, Charles Chilton, who is the son-in-law of the plaintiff, and brother of Thomas Chilton, came to witness and proposed that he would write the deed of conveyance so as to save expense. The witness told him that he would make no conveyance until the money was paid, as the terms of the deed of trust required that he should pay the bank debt first. Chilton then left and said nothing more—that no money was ever paid by Silman or Thompson, and that he had never made any conveyance for the property to any one—that he did not execute the deed of trust himself, nor did he ever have the property in possession under the deed, but that he has since hired the negro man a short time from Charles Chilton. The defendant then introduced John D. Thompson who proved that he was at the sale of the property by Rawlins—that Silman was sick at the time and requested witness to bid in the property for him—that Silman told him to run the land to \$600, and the negro to \$200—that he had no conversation with Charles Chilton on the subject—that he bid off the land for \$200 and the negro for ninety dollars, and told Judge Rawlins it was for Silman—witness paid no money—that the land, if clear of encumbrance, was worth eight hundred dollars, but would not give as much for the negro as he was bid off for—that he was only acting as agent for Silman. This was all the evidence given in the case.

The plaintiff and defendant asked several instructions, all of which, asked on both sides, except the first and last asked by the defendant were refused. The first instruction asked by the defendant, and given by the court, is in these words.

“That if the jury believe from the evidence, that the plaintiff, at any time before the commencement of this suit, accepted of a conveyance of property from the principal debtor, to indemnify him, as his security, and that he authorized said property sold, or accepted by himself or through an agent of the sale, they cannot find for the plaintiff in this suit; provided the property at such sale sold for a sum sufficient to indemnify him.” The other instruction given, involves no principle and need not be stated. The plaintiff then took a non-suit and afterwards moved to set it aside, which was refused by the court.

SHACKLEFORD, for plaintiff in error.

1. A surety, who pays the debt of the principal, may compel a co-surety to contribute, without showing an inability in the principal to pay, and is not bound to pursue the principal before the co-security. *Caldwell vs. Robert*, 1 Dana 355; *Oldin vs. Greenleaf*, 3 New Hamp., 270.

2. The court committed error in refusing the plaintiff's instructions, as warranted by the facts, which show that the plaintiff never received any money arising from the trustee's sale, and the indemnity was of no value to him.

3. When there are several securities to a bond or note, and the principal conveys property in trust to indemnify one of them, and the others are not mentioned in the deed, they are all nevertheless protected, and the trust enures alike for the benefit of all. *McMahan vs. Faucet et al.*, 2 Randolph, 514; *Son vs. Smart*, 5 N. Hamp., 368; *Agnew vs. Bell*, 4 Watts 31.

4. In this case, the proceeds of the trust property were to be paid in discharge of the note due the bank, and as neither the plaintiff's intestate nor the trustee had possession of the trust property, by the terms of the deed, the defendant had an equal interest with the plaintiff, in endeavoring to make the trust fund available for the purposes intended. The case differs in this respect from one in which a mortgage is made to the co-security, and he has the property in his possession by the terms thereof.

5. The defendant, on the payment of his contributive share, has an equal right with the plaintiff's intestate, to be re-imbursed for the amount he may be compelled to pay, out of the trust property, in the event of its being made available at any time.

CLARK, for defendant in error.

1. This being an action by a co-security, it was competent for the defendant to prove, that

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the plaintiff took from the principal debtor, a conveyance to indemnify him—that such conveyance enured to the defendant as well as the plaintiff, although not named in it; and that, before the plaintiff could recover, he must show that the security, thus taken, had been exhausted. *Morrison vs. Poyts*, 7 Dana, 307; 22 Pick., 117; 6 Wendall, 63.

2. The evidence in the case shows, most clearly, that a conveyance of property, ample to pay the debt, was taken from the principal debtor, and that the plaintiff ordered it to be sold, and that it was sold and brought at that sale more than enough to pay what he seeks to recover, as his proportion, from the defendant.

NAPTON, J., delivered the opinion of the court.

In this case the plaintiff took a non-suit, because of the following instruction: "If the jury believe from the evidence, that the plaintiff, at any time before the commencement of this suit, accepted a conveyance of property from the principal debtor, to indemnify him as security, and that he authorized said property sold, or accepted by him or through an agent of the sale, they cannot find for him, provided the property at such sale was sold at a sum sufficient to indemnify him."

This was the only instruction given. Its phraseology might be criticised, if we had not abundant experience of the blunders of copyists; but as we understand its import, its propriety is scarcely questionable, if the facts in evidence authorized it. The instruction is a plain legal deduction from the facts hypothetically assumed. If the sale under the deed of trust brought enough to indemnify the plaintiff and he acquiesced in the conduct of the sale by the trustee, he has no remedy against the defendant, his co-security.

The statement of the case shows there was evidence to warrant this instruction. The fact was, as the testimony discloses, that the plaintiff had taken a deed of trust upon real estate and a slave, amply sufficient to indemnify him—that the trustee was directed to sell under the deed—that he did sell for more than enough to pay off the debt, but the money was not paid by the bidder, and the trustee therefore refused to make a title. It seems that one Silman was also interested in the proceeds of the deed of trust, but only subject to the entire payment of the plaintiff's claim, and that Silman's agent was the purchaser.

It is obvious that the present action is useless in any view of the case. If the plaintiff fails to get his money, from the proceeds of the property conveyed to him, it must be by reason of some gross negligence or willful connivance of his own. It does not appear but that he is still amply secured, and that he need not resort to his co-security for whose benefit the deed enures as well as his own.

Judgment affirmed.

Hadwen vs. Home Mutual Insurance Company.

HADWEN vs. HOME MUTUAL INSURANCE COMPANY.

Under the late act concerning pleadings and practice, although the bond or note which is the foundation of the action is to be filed, it does not become part of the petition, nor is it necessary that it should be included in the copy of the petition which goes out with the summons.

ERROR to Boone Circuit Court.

STATEMENT OF THE CASE.

This is a civil action brought by the defendants in error, in the Boone circuit court, against the plaintiff in error, and in which judgment was rendered at the last February term of the court.

The petition of the plaintiff is founded upon five several notes which the said Hadwen made to said company, and which are annexed to the petition, and so stated in the body of it.

Upon the filing of the petition, the clerk issued a writ of summons, and endorsed it upon a paper writing, as a copy of said petition, when in fact no one of the notes annexed to and made a part of the petition, was copied and sent out with the petition. The clerk also failed to make the copy a true and perfect copy of the petition in some two or three other particulars, viz: The note secondly mentioned in the petition as being dated the 22d day of September, 1847, is described in the copy as bearing date on the 27th day of September, 1847.

The defendant, Hadwen, did not appear to the action, upon the service of the summons and imperfect copy of the petition upon him; and afterwards, at the return term of the writ, and after the time for pleading to the action had passed, the plaintiff asked for judgment by default, which was thereupon rendered by the court against him.

Afterwards, and before the judgment was made final by the court, that is to say, on the 23d day of February, and during the term of the court, Hadwen, by his attorney, moved the court to set aside the judgment, because the plaintiff had not served upon him a true copy of the said petition, &c., with the summons, and, because the defendant was not duly summoned to answer the action, &c., as required by law; accompanying his motion with his affidavit of the truth of the facts stated in his petition, and also with the imperfect copy which had been served upon him. Upon the hearing of this motion the defendant introduced the sheriff, Hickman, who delivered the imperfect copy with the summons to defendant, who testified that the copy annexed to the motion and affidavit of the defendant, was the only copy of the petition that he had served upon him.

The court overruled the said motion made by the defendant, and rendered a final judgment against him for the plaintiffs.

The defendant, Hadwen, excepted to the opinions of the court, in rendering the judgment by default, and final judgment against him, and has brought the case here by writ of error, assigning as error the rulings of the circuit court against him.

HAYDEN, for plaintiff in error.

By the law lately *handed down to us* by our reformer of our code, the plaintiffs were bound to annex to their petition the notes sued on; and as the notes were so annexed, they formed a part of the petition, and not having delivered to the defendant a true copy thereof, with the summons, the service of the writ was not such as to require the defendant to plead to the action, and, consequently, the plaintiffs were not entitled to judgment against him.

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RYLAND, Judge, delivered the opinion of the court.

From the above statement, the only question for our consideration is the service of the writ in this case by the sheriff upon the plaintiff in error, defendant below.

The plaintiff below, in the petition filed in this case, uses the form in some respects as adopted by our Legislature, stating "that defendant, by his promissory note hereto annexed," &c.

The counsel for the plaintiff in error says this statement is required by law, and that by law the notes sued on become a part of the petition and must be copied and sent out with the writ. We do not thus construe this statute. Its provisions nowhere require a copy of the note sued on to be sent out as part of the petition, and no provision expressly makes the original note the foundation of the action, a part of the petition. All that is said about it is found in the examples set forth in the thirty-first article, which may be used when applicable, and these use the words "hereto annexed." But the statute nowhere requires the notes and bonds sued on to be annexed to the petition, nor does it require copies of the notes or bonds sued on to go out with the petition to be served on defendant. The 13th section of the 7th article of the new code of practice in courts of justice declares, that "if either party shall rely upon any record, deed or other writing, he shall file with his pleading an authenticated copy of such record, and the original deed or other writing if in his power." "Original deeds and other writings, filed by either party, as above provided, shall remain on file for the inspection of the other party until allowed by court to be withdrawn."

Here then, the note or bond, the foundation of the action, and upon which the party relies, must be filed with his pleading, and remain for the inspection of the other party until withdrawn by leave of the court. But this does not require it, the note or bond, to be attached or annexed to the petition, nor a copy of such note or bond to go out with the summons or writ to be served on defendant. The defendant knows where to find this bond or note, it will be on file in the clerk's office. He must have twenty days previous notice by service of the writ and petition, before the plaintiff can have judgment against him at the first term of the court—ample time to go to the clerk's office, and examine the original instrument on file against him. Article V., section 4, of the above act, requires that "every summons shall be accompanied by a separate copy of the petition; and the service shall be either, first, by reading the petition and writ to the defendant; or secondly, by delivering to the defendant, who shall be first summoned, a copy of the petition and writ;

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and to such as shall be subsequently summoned, a copy of the writ, or thirdly, by leaving such copy at the usual place of abode of the defendant, with some white person of his family, above the age of fifteen years."

The sheriff certifies, that he executed the writ in this case by "delivering a true copy of the within petition and summons to John A. Hadwin, on the 21st day of January, 1850, in Boone county, Missouri."

The great cause of complaint urged by the plaintiff in error is the failure of the clerk to copy the notes sued on in this case, and to send out the copy thereof attached to the copy of the petition, which accompanied the writ in this case.

Now, I hold the clerk was not bound to do that—and the slight omission to copy the petition, by leaving out a letter or by spelling a word properly which had been misspelled, or any such immaterial defect in the copy, will not be regarded by this court.

The defendant below did not pretend that he had any meritorious defence to offer in this case, if the judgment below should be opened and he permitted to plead. But he relied upon the merest technical objection.

We do not see any sufficient reason to authorise our interference with the judgment below. It is therefore affirmed.

YANKEE vs. CRAWFORD.

Part payment, by defendant to plaintiff, of a note assigned to plaintiff, after the assignment, and a promise to pay him the balance, is sufficient evidence, *prima facie*, to prove the assignment.

ERROR to Jackson Circuit Court.

ROBARDS, for plaintiff in error.

1. The judgment of the circuit court ought to be reversed, because there was no proof of the assignment of the note, sued upon, to Crawford. The deposition of Eleanor Crawford should have been rejected. The identity of the note sued on, and the one assigned to Crawford, the plaintiff, was not sufficiently proven. In fact, there was no proof of the assignment. 7 Mo. Rep. 128.

2. The plea of set-off is a special plea and cannot be pleaded by reason of the 1st section of the act to "simplify proceedings at law." A set-off is a defence to the merits of the ac-

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tion, and under the 5th sec. of said act, may be given in evidence under the general plea prescribed in the act. The 5th section, taken in connection with the first, conflicts with the 4th sec. of the act of 1845, "respecting set-off;" Digest page 1005. Had there been a rule of court, requiring notice of a set-off to be given at the time of filing the general plea, it is possible that defendant might have been precluded from the benefit of his set-off in that suit. But there was no such rule of court. This question depends upon the true construction of two acts of the general assembly, when taken together, and there are no authorities which can be considered applicable, except the general rules of construing statutes. The object of the act of the legislature, from its language, is to prohibit every description of special plea. The words of the act are so comprehensive as to admit of no exception; it excludes every special plea. Courts might, in some cases, obviate some of the troubles and difficulties created by the legislature in the effort to simplify, by adopting a rule requiring notice of set off to be given at the time of filing the legislative plea, or "patent plea." Such is not the case here. Sess. acts 1847, page 108; Digest p. 1005.

HAYDEN, for defendant in error.

1. The court very properly received the evidence of Eleanor Crawford, who had assigned the note to the plaintiff, as proof of the assignment, in connexion with the evidence of the other witness, who testified also to the fact of the assignment. The only fact which it was introduced to establish, was the question as to the assignment of the note; and it would seem to me that she was a very good witness to prove the fact, as she was testifying against her interest, by proving that she had ceased, by her assignment, to have any interest in the demand; and, surely, the defendant having recognised the right of the assignee to the money due by the note, by paying the \$60, after having inspected the note with the assignment endorsed thereon, has no right to complain. He could not be injured by the evidence.

2. The court did not err in refusing evidence to prove an off-set, when none had been filed with his plea, nor any notice given that any such defence would be relied on upon the trial. See Digest pp 105, 106, sec. 4 of the law of set-off.

3. It devolves upon the plaintiff in error to show, upon the face of the record in his bill of exceptions, that the account, which he offered to file and to prove, was an account allowable by law, as a set-off, either against the assignor of the note at the time of the assignment, or against the plaintiff himself, at the time of the commencement of the suit. This he has not done, so far as the record shows.

Judge BIRCH delivered the opinion of the court.

Crawford sued Yankee on a note made to Eleanor Crawford, payable twelve months after date, for two hundred dollars, with interest at the rate of ten per cent. per annum. The note was dated on the 6th day of March, 1840, and was alleged to have been assigned to the plaintiff below (defendant in error here) on the 22d day of February, 1848; the assignment being made by affixing the mark of the assignor.

The defendant pleaded the general issue, and the cause, by consent of parties, was tried by the court without a jury, and judgment rendered in favor of the plaintiff for the sum of \$163 20 debt, and \$25 80 damages.

Upon the trial, the plaintiff read the deposition of the said Eleanor, in which she states that she assigned a note, of the description and date

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in question, to the plaintiff, on the 22nd day of February, 1848, and that that was the only note she assigned him on that day. The reading of this deposition was objected to by the defendant, the objection overruled, the opinion of the court excepted to, and the point properly presented in a motion for a new trial.

The plaintiff next proved by a witness that he was present about the 24th of February, 1848, when the note, thus assigned, was presented to the defendant for payment; that he made a payment upon it of about \$60, (which was credited) and that he promised to pay the balance.

Upon this testimony, the plaintiff was permitted to read the note in evidence, to which the defendant objected and excepted.

The defendant then produced and offered as an offset an account which had not been previously filed in the cause, and of which no other notice had been given to the plaintiff, to the reception of which, or of any testimony to support it; the plaintiff objected, was sustained by the court, and the defendant excepted.

Upon the last point, as it nowhere appears in the record of what the account consisted, when it was contracted, or even *against whom it was*, we deem that the defendant has not placed his complaint, in that respect, in a position to have it here intelligently investigated. It is therefore passed over, without the necessity of even considering the point relied upon by the counsel for the appellee on the score of notice.

Respecting the admissibility of Mrs. Crawford's deposition to prove the previous assignment of the note in question, (her mark being equivalent when thus identified to her written signature) we have been unable to perceive any valid objection; and when to this there is superadded the additional testimony of the witness who saw the defendant pay a portion of the debt to the plaintiff, (as assignee) and promise to pay the balance, any further objection on the score of the assignment would seem scarcely to reach the dignity even of a technicality. The judgment of the circuit court is therefore affirmed.

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Plaintiff after giving his evidence took a nonsuit, and before the jury had dispersed but after the nonsuit had been entered upon the minutes, he moved the court to cancel the order of nonsuit and allow the cause to proceed: this the court refused; although in matters

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of practice much latitude is allowed to circuit courts, in this case the reasons for the application, as appear in the record, make it manifest that the substantial ends of justice would have been promoted by cancelling the order, therefore the judgment of the court is reversed.

APPEAL from Saline circuit court.

DAVIS & CLARK, for appellant.

The testimony of D. C. Garth does substantially support the declaration, and the proof in relation to Collier paying the boat \$2 50 per hogshead for shipping the tobacco in the warehouse at Glasgow, was a contract independent of the contract declared on. See 1 Chitty, 333, 344.

The testimony of Homrickhouse, in the deposition, sustains the count in the declaration as declared on, substantially; it being apparent in the whole deposition that the witness uses the terms 31st August and 1st September indiscriminately with reference to the time when the contract was to terminate.

The discretion of the court was not soundly exercised in refusing to let the case proceed when the testimony of Homrickhouse, in the second deposition offered, was discovered. The court could see that Collier had a just cause of action; that delay was injurious to him, and that to proceed with the cause at that time, could work no surprise on Swinney. To exercise discretion *soundly*, it should be done in furtherance of the ends of justice.

LEONARD, for appellee.

1. The contract as proved by Garth, varied from the contract alleged in the consideration for the promise, the freight to be paid, one being for \$2 per hogshead for all, and the other being for \$2 50 for all then delivered, and \$2 for what should be afterwards delivered, and less if other boats carried for less.

Chit. Pl. 320, 321, 325, 326, 329, 334.

2. The contract, as proved by Homrickhouse, varied from the contract alleged in the thing promised to be done. The contract alleged is to carry out all the tobacco that should be delivered at Glasgow on or before the 1st day of September, 1846. The contract proved by Homrickhouse is "to take out the tobacco until the 31st of August, 1846." Chitty's Plead. 329, 331, 334, 337, 341; Stone vs. Knowlton, 3 Wend. Rep. 374, 376; Penny vs. Porter, 2 East. 2.

3. The refusal of the court to cancel the order for the non-suit, was a matter within the discretion of the circuit court, and not subject to the control of this court.

4. If, however, this be otherwise, the presumption is that the circuit court exercised its discretion correctly, and there is nothing here to show it otherwise.

Judge BIRCH delivered the opinion of the court.

The declaration in this case was an assumpsit, upon an undertaking of the steamer Wapello, of which the defendant below was part owner, to transport tobacco from Glasgow to St. Louis; the injury complained of being the omission of the boat to carry it according to the undertaking.

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The declaration contained three counts. The first one charges that the plaintiff agreed to send to St. Louis all the tobacco, in hogsheads, that he should be able thereafter to deliver at Glasgow, on or before the first day of September, 1846, and that in consideration thereof, and the further consideration of two dollars per hogshead, the defendant agreed to transport it. The count then alleges that the plaintiff had at Glasgow a large number of hogsheads of tobacco on the 1st of September, aforesaid, and that the defendant omitted to transport it as agreed upon.

The second count is as the first one, except that the freight, instead of being two dollars per hogshead, was to be the same price as charged by other packets, and the third count only varies from the second one in the allegation that the freight was to be the lowest packet charge during the time.

The plea was the statutory general issue.

Upon the trial, the plaintiff proved by one of his witnesses, that the contract with the boat was to carry from Glasgow to St. Louis, all the tobacco the plaintiff then (in May, 1846) had at Glasgow, being 38 or 40 hogsheads, at two dollars and fifty cents per hogshead, and all the tobacco which he should deliver at Glasgow between that time and the first day of September, 1846, at two dollars per hogshead, or less, if other boats should carry at less. He also proved by another witness, who was present when the contract was made, that the contract was to take the tobacco out of the Missouri river to St. Louis, until the 31st day of August, 1846, at two dollars per hogshead.

This being all the evidence, the court, on the motion of the plaintiff's counsel, excluded it from the jury upon the ground that it varied from the declaration, and thereupon the plaintiff suffered a non-suit. After the entry of the non-suit upon the minutes of the clerk, however, and before the jury had dispersed, the plaintiff prayed the court to cancel the order of non-suit, and allow the cause to proceed, so as to enable him to read from another deposition on file, given by one of the same witnesses, testimony to the effect "that the contract with the plaintiff for carrying out the tobacco, expired on the first day of September 1, 1846."

This the court refused, and the exclusion of the evidence of the contract, and the subsequent refusal of the court to cancel the order for the non-suit, and allow the cause to proceed before the same jury, was made the grounds of a motion to set aside the non-suit and reinstate the cause. This being overruled, the cause comes before us by appeal.

In the case of Woodson vs. Hall, decided at the present term, the

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court designed to intimate that whilst an appellate tribunal should continue to presume much in favor of the soundness with which the subordinate tribunals have exercised the discretion confided to them in matters of practice, cases might, nevertheless, present themselves in which from the showing of the record, we would feel constrained to review and correct it. Such is deemed to be the case before us—it being manifest to our understanding, that the substantial ends of justice would have been better promoted by permitting the cause to proceed as prayed for, whereby, (it will not be controverted) *under the additional testimony which it was then proposed to introduce*, the Judge would not have felt it his duty to renew the instruction complained of, but would have permitted the testimony to go to the jury. In that manner, the whole case might have been promptly and fairly disposed of, without surprise or wrong to either party.

For the reason thus intimated, the judgment of the circuit court must of course be reversed and the cause remanded.

McCARTY vs. HALL.

An administrator, appointed under the laws of another State, cannot endorse a promissory note made payable to the intestate by a citizen of this State, so as to give the indorsee a right of action here in his own name.

ERROR to Jackson Circuit Court.

WILSON, for plaintiff in error.

The court below erred in giving judgment against plaintiff upon the demurrer. There are some special causes assigned in said demurrer, but as there is but one cause set out in the demurrer, permitted by the act reforming the practice at law, approved February 24, 1849, I will notice that alone, which is, the plaintiff has no legal capacity to sue. The objection is made for two reasons: 1. Because the letters were void, being signed by the deputy instead of the principal clerk. This objection is met by the denial that it is necessary that the letters should be signed at all. It is the seal of the proper court that gives them authenticity. See Tollen on Exrs. and Post vs. Caulk, 3 Mo. Rep. 35, (1 Ed.) 2. Because letters taken out in another State do not authorise the administrator to bring suit in this State, and that therefore his assignee cannot. This question is settled for the plaintiff in the case of Harper vs. Butler, 2 Peters, 239. A third reason may be urged, which is this; that the assignment being on a separate piece of paper, and not endorsed on the note, is not such as authorises suit to

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be brought in the name of the assignee. There are two answers to this last objection: *First*, Such assignment, and plaintiffs being in possession of said note, is at least evidence of a transfer by delivery, which authorises the transferee to sue in equity in his own name, and recover the amount of the same; and this action having been brought under the aforesaid act, which confuses and confounds law and equity, the plaintiff has a right to avail himself of either remedy—in fact, it compels the party in interest to sue in his own name. *Second*, Such assignment is good under our statute of assignment of notes and bonds. See *Abell & Isbell vs. Shields*, 7 Mo. Rep. 120, 2 Bibb. 83; 3 Monroe, 46.

HAYDEN, for defendant in error.

The demurrer to the petition was well taken, and the court committed no error in sustaining it, and in rendering judgment thereon for defendant.

RYLAND, Judge, delivered the opinion of the court.

John McCarty sued Jacob Hall in the circuit court of Jackson county, in this State. The action is under the new statute concerning the practice in courts of justice.

The petition discloses the following facts: That on the first of August, 1845, the defendant, Jacob Hall, executed and delivered to Edward Wilson his promissory note for the payment of fifteen hundred and twenty-two dollars and fifty cents, payable three years after date.

That said Wilbourn died, and that some time in 1847, administration of his estate was duly granted to Robert Wilbourn by the probate court of Dallas county, in the State of Texas. That said Robert Wilbourn took upon himself the burden of the said administration, and afterwards, and before the bringing of this action, said Robert Wilbourn, as such administrator, assigned over the said note to the plaintiff, John McCarty; and this suit, by McCarty, is in his name as the assignee of said administrator.

The defendant appeared and filed his demurrer to the plaintiff's petition, setting forth, among other causes, that the "plaintiff hath no legal capacity to sue the defendant on said note."

The court below sustained the demurrer, and gave judgment thereon for defendant, and the plaintiff brings the case to this court by writ of error.

The only question for our consideration, on this record, is the one involving the power of the plaintiff to maintain this action in his own name, as the assignee of an administrator of another State.

Can the assignee of a promissory note, transferred to him by the assignor as the administrator of an estate of a person dying intestate in a sister State, sue the payer and maker of said note in this State? If he

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can, then the judgment below must be reversed. If he cannot, it must be affirmed.

It is the well settled law of the land, that the foreign administrator could not, himself, maintain this action, in his capacity of administrator upon a note given by a person living in this State to his intestate in his lifetime. See Chapman, Adm'r of Lester vs. Fish, 6 Hill, 554. Simple contract debts are *bona notabilia* in the State where the debtor resides, and an administrator appointed in another State cannot release or control them. See Byron vs. Byron, Croke Elizab. 472. "The debt is where the bond is, being upon a specialty, but debt on simple contract follows the person of the debtor; and the difference has been oftentimes agreed." Swinburn says, "Debts due the testator will make *bona notabilia* as well as goods in possession, but there is a difference between bonds and specialties and debts due on simple contract; for bond debts make *bona notabilia*, where the bonds or other specialties are at the time of the death of him whose they are, and not where he dwelt or died. But debts on simple contracts are *bona notabilia* in that country where the debtor dwells."

In the case of Godwin vs. Jones, 3rd Massa. Rep. 514, Chief Justice Parsons declared the law to be, that an administrator who has received letters of administration, under the authority of another State, cannot prosecute an action in Massachusetts by virtue of such letters of administration. "Administrators powers result from the provisions of law made to dispose of the intestates effects after his death had extinguished his property in them; and these provisions cannot extend to the effects not within the jurisdiction of the State from which such provisions of law derive their force." See the case of Riley vs. Riley, 3 Day's Rep. 74.

In the case of Stearns vs. Barnham, 5 Greenleaf Rep. 261, this point came fairly before the supreme court of the State of Maine. I will, therefore, refer to the facts of that case, and quote the language of the court.

This was an action of assumpsit by the endorsee of a promissory note against the maker. The note was made payable to William Stearns of Salem, in Massachusetts, and endorsed by his executrix, who resided also in Salem, Massachusetts, to the plaintiff. The letters testamentary issued from a probate court in Massachusetts to the executrix. The maker of the note always lived in Maine. A verdict was taken for the plaintiff, subject to the opinion of the court, upon the question whether any right to maintain this action was conveyed to the plaintiff by the endorsement of the executrix.

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It was argued for the defendant against the power of the executrix to convey to the plaintiff a right of action in his own name, on the ground, that it facilitated the withdrawing of funds from this State, which might be wanted for the payment of debts due to our own citizens. On the part of the plaintiff, it was contended, that as the executor succeeded to all the rights and equities of the testator, with the general power to endorse and thus transfer his negotiable notes, it was essential to the exercise of this right, that the endorsee should have all the powers of the payee, including the right to sue in his own name; otherwise the note must lose its negotiable character. This right being once vested in the endorsee, belonged to him always, and in all places by the law merchant. The executor is no longer known as such, except as having been the medium of passing the property to the endorsee, and his authority, under the laws of another State, to transfer the property, and with it the privileges of an endorsee, may be proved before this court, as any other act in *pais*.

Mellen, Chief Justice, delivered the opinion of the court. He said, "It is clear that the executrix herself, could not maintain an action in our courts upon the note, as was decided in the case of Jones vs. Goodwin, 3 Mass. 514. We would merely observe that the power of the executrix, by law, is to administer all the goods, chattels, rights and credits of the testator, which are within Massachusetts. Debts due to the testator, at the time of his death, from persons residing in other states, are placed by law on the same ground as goods and chattels belonging to him and being in another State. Over these, she, as executrix, deriving her authority under the laws of Massachusetts, has no control. We are then lead to enquire, how an executor or administrator, acting under an authority derived from another State, can, by endorsing a note due from one of our citizens, give to his endorsee a power which he himself does not possess—that is, of successfully suing for and recovering it in our courts. If this can be done, it will be an indirect mode of giving operation in this State to the laws of Massachusetts, as such; or, in other words, to an authority derived directly from laws which are not in force in this State. By adopting such a principle, the effects or credits of a testator or intestate, found in this State, might be withdrawn, which may be necessary for satisfying debts due from such testator or intestate to citizens of this State. Such a principle or course of proceeding has often been successfully opposed. See 3 Mass. 517; 4 Mass. 324; 8 Mass. 515; 9 Mass. 350; 11 Mass. 269; 3 Pick. 128; 5 Cranch, 289; 13 Mass. 146."

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The court were all of opinion that the plaintiff could not recover, and that the judgment must be entered for the defendant.

This case is directly in point, and the reasoning is, to my mind, satisfactory and conclusive. Were our courts to permit the executors or administrators of another State to sue and maintain actions on notes and bonds due to their testators or intestates by the citizens of our State, or to permit their assignees to sue; all the effects, goods, and chattels of such testators or intestates might thereby easily be withdrawn from our jurisdiction to the prejudice and injury of our citizens. Such is never suffered or permitted. It is our duty to guard the interests of our own citizens, to look well to our own household first. *Nostrum jus, magis quam jus alienum, servemus.*

In this case, the debt due by Jacob Hall to Edward Wilbourn—Hall residing in this State and Wilbourn dying in Texas—never was *bona notabilia*, in Texas—never was assets in the hands of the administrator in Texas, but remained as goods and chattels in Missouri; was *bona notabilia* in this State, and can only be lawfully demanded of Hall by a person clothed with authority under our laws. Said debt never was under the control of the foreign administrator.

All the argument then about vested rights in the administrator and in his assignee, being without foundation, vanishes “into air, into thin air.”

I am aware of the case reported in 2 Peters, Harper vs. Butler, page 240, and though I entertain the most profound respect for the opinion of the able jurist who decided that case, yet, from the report of the case it is manifest that it was but lightly considered by the court. It was not argued by any person for the defendant in error, and the point appears to me to have escaped the mind of the Judge.

The court, in their opinion, say that “the district court proceeded on the idea that the executor in Kentucky could not transfer a chose in action in that State, because the obligor did not reside there. This court supposes the law to be otherwise.” Now, the question as to where the *bona notabilia* in this case were, at the time of the assignment, was never noticed by the court. If Butler gave his note to Morrison, the testator in this case, and Morrison lived and died in Kentucky, and Butler lived in Mississippi, and not in Kentucky, then I consider the debt of Butler to Morrison, never was under the control of the Kentucky executor; nor could he or his assignee sue for it in Mississippi, unless the laws of Mississippi authorize it. The authority of this case, lacks the consideration and attention which were bestowed on the case of Stearns vs. Bumham, 5 Greenleaf Reports. The authorities on

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this subject have been collected by Cowen and Hill in their notes to Phillip's Evidence, page 870, and from a perusal of many of the cases therein cited, I am of the opinion, that the soundest principles of public policy, as well as a proper regard to the law of the case, requires this court to declare the law in favor of the defendant in error.

This being the opinion of my brother NAPRON, the judgment of the Jackson circuit court is affirmed.

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Facts stated and discussed which the court considers insufficient to charge a party as trustee.

ERROR to Cooper Circuit Court.

LEONARD & HAYDEN, for plaintiff in error.

1. The final decree and all other orders, decrees and proceedings had, and done in the circuit court anterior thereto, are necessarily presented and proper to be reviewed, considered and determined by this court upon this writ of error. See 17 Johnston's Rep. 559, Jaques vs. Methodist Episcopal Church; 1 Cowen's Rep. 702, Atkinson vs. Marks; 1 John. cases 498, Le Guen vs. Gouverneur and Kemble; 2 Cow. Rep. 208, Wilson vs. Troup.

2. The defendant, John Hardeman, by his answer, denies every material allegation contained in the bill of complaint, and the complainants have utterly failed to show the answer false in any one particular, by one witness and strong circumstances, as by law it devolved upon them to do to overturn his answer; but, on the contrary, all the testimony in the cause strongly corroborates the truth of his answer.

3. The suit having been instituted by Sophia Campbell (claiming the life estate in the negroes) and her husband for an alleged conversion of the property by John Hardeman, in his life time, to obtain redress for the wrongs of which she complained, cannot now, (she and her husband, and the original defendants all being dead) be converted and transferred as a remedy in favor of the reversioners, the plaintiff, to redress their supposed loss, as is demanded by these new parties, plaintiffs who were strangers to the original suit, and had then no right to mingle or join in the suit, and have no right now to tack themselves upon it. But if they be permitted to come in and tack their suit upon the suit first brought by the tenant for life, it illy becomes them to deny the defendants the right to litigate their rights to the property in the same manner as if the suit had been commenced by them.

4. If there were any evidence in the cause to establish the alleged facts that John Hardeman, in his life time, was invested as trustee with the legal title to the property and bound to hire out the negroes and to account therefor to Sophia Campbell, and to have the negroes with their increase down to the time of his death to be rendered to another, as his successor in the office, then, we insist that the trust was a personal trust or duty, and so far as the hiring out of the negroes, their management, &c., was concerned, this duty ceased with his existence and did not attach to his

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estate nor devolve upon his administrator, who is only bound to represent the intestate through his estate in all his liabilities existing at the time of his death; and therefore, in no point of view, upon principle, can the plaintiffs recover in this suit compensation against or out of the estate of the deceased for failing to serve them when dead. This would be a harsh and rigid rule and would be well calculated to increase the horrors of death greatly. We insist that no man's estate can be bound to respond, in the hands of his administrator, except where he imposes upon it a burthen, directly or indirectly, by contract, or by some act or violation, or neglect of duty, in his life time, for which, by law, a judgment after his death may be obtained.

5. The original complainants, in their bill, show that they had no right in equity, (if it were as they allege, that Jno. Hardeman was the trustee of the property at the time complainants had the possession of it) to charge him after he got possession of it. In account for the value of their services, under the circumstances, as set forth by them, they show that John Hardeman tortuously obtained from them the possession of the negroes and in like manner converted them, by sending them to another State, thereby showing that the possession, (if there were any possession) thus acquired, was held adversely by him as a wrong doer against their right and for which he could only be charged in damages commensurate with the injury sustained by them, to be ascertained and determined by the same rule of law, applicable to all cases of wrong doers, and which is the value of the property with interest upon that value down to the time of assessment. We assert that the complainants affirm, by their bill, that John Hardeman did not obtain and hold the property as their trustee, but on the contrary that he repudiated the trust, held and converted the negroes to his own use. It is true, that if the allegations in their bill be true, charging a transfer of the negroes to him, in trust for the said Sophia, they show a right in her to demand of him, John Hardeman, that he, as trustee, should honestly obtain the possession of the trust property and faithfully and honestly manage and use it as required by the instrument conferring the trust; but we insist that a *cestue que trust* can have no greater right or interest in the trust of property, claimed by him than the absolute owner can have in property which he claims, and by consequence cannot claim or have a greater compensation for the loss of it, or an injury to it. So therefore, if it be true (as we presume it will not be controverted) that the absolute owner of property can only recover for the conversion of his property, its value with interest, and not what he might have realized by the services or the use of it, neither can a *cestue que trust* recover more for a similar injury to his property. But there is nothing shown by the proof that John H. ever had, in fact, the possession of the negroes even as the trustee of Sophia Campbell, nor any thing showing that he was under any obligation to her or her children to serve them in hiring out the slaves, &c; and clearly under no such obligation to these complainants.

6. But if it be true that Sophia Campbell, in her suit, was entitled, as was contended for her by her solicitor, to recover of John Hardeman as upon an account for the proceeds of the hire, or for what might have been realized by him as a faithful trustee by the hiring of the negroes, during his life time, yet that right has been abandoned by her legal representatives since her death, and there is nothing presented in this case making it necessary for this court to adjudicate upon it.

7. We insist that if the complainants ever had a right at any time to charge John Hardeman, as trustee of the property sued for, that right was satisfied, extinguished and abandoned upon a revision of the contract under which it is alleged to have accrued, by the return of the negro, Lucinda, to John Tharp the agent of Wm. Campbell.

It is expressly shown by the answers of both the Hardemans, and corroborated and proved by John Tharp, the agent of William Campbell, that they delivered to him said John Tharp as agent of said William Campbell, the slave, Lucinda, soon after or about the time of the return to Thomas Hardeman of his four negroes, Manuel, Harriet, and their two children, and that he, Tharp, received her as such agent. Here there are two answers under oath by the two defendants, corroborated by the testimony of the said Tharp, and not one particle of proof, or an attempt at proof by the complainants, to disprove the truth of what those answers affirm; so that, if the allegation in the bill, charging that this woman, Lucinda, was given in exchange for the negro children, Julia Ann, and Washington, had been sustained by any proof, then, we insist, as above stated, that the

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return of those negroes to Thos. Hardeman, or to John Hardeman, and the receipt of Lucinda by Campbell dissolved or rescinded the contract under which the exchange is alleged to have been made, and consequently, put an end to all further interest pretended or contended for by complainants in those two negroes, Washington and Juka Ann.

8. We insist that the two answers of the Hardemans clearly deny that there was any other instrument than the will of the said Thomas Hardeman, made in the summer of 1821, by which any transfer of any of the negroes was made to the said John Hardeman, to hold in trust for the said Sophia Campbell. These answers are corroborated by the bill of sale of Lucinda, under the hand and seal of the said William Campbell—by the letter to her father written by Mrs. Campbell herself, in which she expresses her fears or opinion that his last will, in making the gift of the negroes to her, would not effect the object, &c., which he intended by it, &c. The answers are also corroborated by the depositions of John Tharp, Cain and Zadock Martin, even by the impudent and ungrateful letter of Campbell himself, in which he confesses (as he states) that he stated to William L. Smith, a respectable citizen of Clay county, that he, Campbell, had no title to the negroes.

9. We insist that even if it should be held by this court that the plaintiffs have a right to recover in this case, in any view or aspect of it, that then the court below erred in not sustaining the exceptions of the defendant to the report of the commissioner in stating the account under the order of the court. 1st. By the order of the court directing the account to be taken by him, he was directed to take it with reference to the value of the four negroes, Manuel, Harriet, Julia Ann and Washington, and as to the value of their services; whereas he has gone further and taken it with reference to other and additional negroes, not mentioned in the said order of reference. 2nd. That the account, as taken, is not sanctioned by any rule or principle of equity, nor by the proof in the cause.

ADAMS, MILLER and STUART, for defendants in error.

The complainants conceive that the only question for the consideration of this court, now presented by the record arises upon the action of the court overruling the exceptions of defendant to the commissioner's report and the decree consequent thereon. The question as to the equity contained in the bill and right of the party to relief, as shown by the bill, answer and proofs in the cause, was fully considered by this court at the December term, 1832, when the cause was then first before it in the first judicial district, and which cause the counsel for complainants have not been able to find among the reported cases decided by this court, but from the certified copy of the opinion of the court, it appears that the supreme court held "that the trust is well made out against John Hardeman, and that he has failed to fulfil the duties thereof." The court further says: "The evidence satisfies us, that Thomas Hardeman did confederate with John Hardeman to defeat Campbell and wife from receiving any benefit arising from the trust estate. For these reasons, the decree of the circuit court, dismissing plaintiff's bill, is reversed, and cause remanded," &c. To this opinion of this court, the counsel for complainants would refer the court, and as fully sustaining the opinion, the evidence offered by complainants, particularly the letter of John Hardeman to Wm. Campbell, also the letter of Thomas Hardeman to his daughter.

The counsel for complainants insist that the report conformed to the order of the chancellor, and was warranted by the law and evidence. The first objection is that the commissioner reported the value and annual hire of seven slaves, not named in the order referring the matters of account to him. The complainants conceive that the maxim of law, *partus sequitur ventrem*, fully authorised the commissioner to hear proof as to the fact of issue of the female slaves—that if any issue were found, the law gave them, or their value and hire, to the party entitled to the property in the mother, and in fact the decree required the commissioner to take an account of the hire, profits and value of the slaves, and the issue of course, are a part of the profits.

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The second, third, fourth, fifth and sixth exceptions are in substance that the commissioner has charged the defendant with hire, and has charged more hire and assessed a greater value upon the slaves than by law and evidence he was authorised to do, and that the commissioner has charged more interest than he ought to have done. To the first objection, that the commissioner has charged the defendant with the hire of slaves, it is sufficient to say that if this was the object or a part of the trust devolved upon him and accepted by him, then there is no question as to his liability to the *cestui que trust*. It was his duty under the trust to hire the slaves, and account to Mrs. Campbell for the amount of the hire; and if he failed to hire them, then he made himself personally responsible for the hire. It is not deemed necessary to refer to authority to sanction the court in overruling such an objection.

As to the questions whether the commissioner has charged too much for their hire, or affixed too great a value upon the slaves, can only be decided by a reference to the evidence before him, and taken by him under the order of the court. As to the question of interest, there can be no doubt, if the complainants were entitled to the annual hire, during the life of Mrs. Campbell, or her heirs, to the slaves and their profits at her death, as the commissioner has allowed the usual, customary and legal interest, we presume the parties were entitled to that rate if entitled to any.

The 7th and 8th exceptions are in substance that the commissioner has not allowed defendant enough compensation for hiring out the negroes, or for his trouble in rearing the young children. It appears to counsel for complainants, that these objections come with an ill grace from a party, who in his tenth objection says commissioner has allowed complainant's hire when there is no evidence that the slaves were even in his possession, or were ever hired out. The complainants would ask, if the trustee has violated his duty in not keeping the possession of the slaves, after they were delivered to him, can he with any appearance or semblance of justice say that he has not been allowed compensation for rearing and taking care of the young. If it was his duty to hire them out, and he, by failing to discharge that duty, has made himself responsible for their annual value, can he equitably demand compensation "for his trouble in hiring?" Can he be entitled to compensation for doing that which he says was not done? Can he neglect his duty, and then ask for the reward of a faithful servant? But the commissioner did allow him compensation for hiring out the slaves, and this allowance was made from the evidence of experienced men as to the worth of such services. He has allowed the defendant compensation for his trouble and expense in rearing the young slaves; and this predicated upon the same character of evidence. The allowance made for hiring was \$534 38, which was more than 5 per cent. upon the whole amount of hire and interest reported by commissioner.

Most of the objections made to the report of the commissioner are such as must be decided by reference to the evidence before him, and that evidence being voluminous, we beg leave to refer the court to it as fully sustaining and warranting the report made, and if that report be sustained, then the decree rendered in the cause was equitable and just.

Judge BIRCH, delivered the opinion of the court.

In the year 1827, during the life-time of John Hardeman, Sophia W. Campbell and her husband instituted against him, in the Howard circuit court, a suit in chancery. The substance of their original and amended bill is, that Mrs. Campbell was the natural daughter of Thomas Hardeman, who was the father of the said John, and subsequently made a co-defendant with him. That some time in the year 1821, the said Thomas came to the residence of the complainants in Boone county,

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(in this State,) and after stating to them that he was old, and not longer disposed to give himself trouble with his property or effects, remarked that he owned, amongst other negroes, a family consisting of Manuel, his wife Harriet, and their two children, Julia Ann and Washington. That he had promised Manuel that he would not separate him from his family, and that his desire was to make such an arrangement as to be able to divide the said family, and another man servant named Dick, between Mrs. Campbell and another daughter. He thereupon suggested to the complainants, that as the two children of Manuel and Harriet were worth about as much as a certain negro woman of theirs named Lucinda, if the husband of Mrs. C. would convey to him that woman, he (the said Thomas) would convey the family of slaves in question to Mrs. C. for life, and afterwards to be divided equally between her children by a former marriage and those of her then marriage with Campbell. The bill alleges that this proposition was readily assented to by the complainants, and that in order that the necessary writings should be drawn up, it was proposed by the said Thomas, and acceded to by the complainants, that they should visit their said father, with or near whom, at his then residence in Howard county, the said John Hardeman resided, and who, in deference to his knowledge in the law, it was agreed should prepare the necessary papers. That accordingly, about the month of September, 1821, the complainants did make the visit agreed upon, and that the said John, (at the request of the parties) did prepare a conveyance of the said family of negroes to *himself*, as trustee, to hold for the said Sophia and her children, as previously agreed upon, which was executed by the said Thomas, and left in the possession of the said John. The bill further charges, in this connexion, that the said Campbell by his deed, conveyed to the said Thomas the woman Lucinda—that Manuel and family were delivered to complainants, and that Lucinda was delivered to Thomas, who received her in full satisfaction for said Julia Ann and Washington. (In the view we have taken of this case, it is deemed unnecessary to notice the difference between the original and the amended bill in this and some other respects, our conclusions under the state of the testimony, being the same in either point of view.) The bill goes on to allege, that it was further agreed and understood between the parties, with a view to fulfil the promise alluded to, "not to separate Manuel from his family" during the life of the said Thomas; that if the complainants should take possession of him and family, and they could not agree with each other, they were to be surrendered to the defendant (John Hardeman) as trustee, to be hired out by him for the best price, and the net proceeds, after

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deducting necessary expenses, to be paid annually to said Sophia, during her life.

The complainants further state, that afterwards, in the summer of the year 1822, Manuel and his family became dissatisfied and unwilling to live with them—that Manuel ran off from them and went and communicated his dissatisfaction to John Hardeman, who thereupon, in pursuance of the powers conferred upon him as trustee, demanded the restoration of the family, promising in said demand, to comply fully with the requisitions of the agreement by hiring out the negroes, and paying the net proceeds to said Sophia. That the complainants complied with said demand, by delivering the negroes to said John on the 27th day of August, 1822, at which time, in the fulness of their confidence in him, they did not lift the said agreement, and that they never had a copy of it. That they had made frequent applications for a copy of the agreement, and for payment of the hires, &c., all of which had been refused by said John, who denied having any agency or trust to perform for them touching any of the premises in controversy.

They also charged him with having aided and assisted others in running the negroes into unknown places in Tennessee, so as to cheat and defraud them—that the negro woman has had increase since her return by the complainants, and they call for an account of the hirings, for a discovery of the residence of the negroes, for the displacement of said John, and the appointment of another trustee, and for all other reasonable and appropaiate relief.

The answer of John Hardeman denies that he was ever invested, as trustee, with any right, power or authority, to hire out, control or manage said negroes, by virtue of any transfer of them by his father, under any instrument drawn by himself or any one else. He denies ever having had the negroes in his possession, care or government, or that he has ever hired them out, or received any hire for their services, as charged in the bill, or that he ever mismanaged them, as trustee, or otherwise. He admits that in the summer of 1821, he drew a will for his father, in which he was appointed executor, and also trustee for said Sophia, in regard to the contemplated bequest therein of said Manuel and family, (or a part of them,) but insists that as his father was still living, he did not thereby acquire or even then have the power, as trustee, to exercise the duties therein contemplated.

He admits that by a bill of sale, dated on the twelfth of September, 1821, the husband of said Sophia transferred to his father the negro woman Lucinda, for the consideration, as therein stated, of the contemplated bequest in favor of his wife and her children, and he assigns as one

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of the reasons why his father desired thus to settle the property upon his daughter and her children, that it was to guard her ultimate interest in case a separation, which was at one time portended, might take place between them.

He further states, that in the month of November, 1821, the complainants, whilst removing from Boone to Clay county, stopped at the residence of his father, where he (the respondent) also *then* resided, and that *at his suggestion*, his father loaned to the complainants the family of negroes in question, in order to assist them in opening a new farm, but that he took from Campbell a bond to return the negroes whenever he (respondent) should request their return to his father; the reason why they were to be returned at the request of respondent being, that he *might* and *would* become the actual trustee, in case his father did not change the provision in his will, which he might and intended to do, should the said Manuel and family become dissatisfied and unwilling to live with the complainants. He also states that the obligation given by Campbell for the return of the negroes to his father, is the only one he ever had in his possession in regard to the entire transaction between his father and the complainants, and that upon the return of the negroes to his father, that bond was cancelled and Campbell notified thereof, and that it is since lost or mislaid.

He further states, that at the time said bond was given by Campbell for the contingent return of the negroes, he distinctly remembers to have stated to him, that as the consideration for the transfer of Lucinda, as specified in the bill of sale, was the contemplated bequest of Manuel and family, by said will, to his wife and children, if his father should *change* the will, and not *make* the bequest, a court of equity would decree a restitution of Lucinda to him, said Campbell.

He denies all knowledge of any transfer of Manuel and family, by his father to the complainants, as set forth in their bill, as also all knowledge of the number of children (if any) born of Harriet since her return to his father, nor does he know what disposition his father made of them, or where they are. He admits that Lucinda was left at his father's during the temporary use of Manuel and his family by the complainants, and his answer to the amended bill states that she was returned to the agent of the complainants on the 15th of October, 1823.

He asserts, finally, that he recalled the said Manuel and his family from the possession of the complainants at the request and in conformity to the wishes of his father, who afterwards made some disposition of them, in which he (respondent) had nothing to do, and denies all fraud and confederacy, as charged in the bill.

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The substance of Thos. Hardeman's answer concurs with that of John Hardeman. He emphatically denies that he ever transferred, or contracted to exchange with Campbell, the two negro children, Julia Ann and Washington, for the negro woman, Lucinda, as charged in the original bill of complaint. He denies that he ever transferred to John Hardeman the said children, or any of the negroes, to hold in trust for said Sophia and her children, but admits that in the year, 1821, he got his son John to draw his *will*, in which he *willed* to John the said family of negroes, in trust for said Sophia during her life, and after her death to her children, but of which will the said John never had the possession, it having been retained by him (the testator) with a view to make any change in its provisions he might subsequently think proper.

He states that he made known to the said Sophia, previous to this time, that he would make a will of these negroes, in trust for her and her children, upon the condition that her husband would transfer to him said Lucinda, so as to enable him, in the division of his property, to give to another daughter the said Lucinda and a negro man named Dick—but that in the transfer to him of the said Lucinda, the consideration of such transfer should be expressed to be the "provision for the said Sophia and her children in his will," so that if he should ultimately change his mind as to this provision, the said Campbell (her husband) could *retain* his woman Lucinda. He further states that this will, with the said provision as made therein, together with the condition suggested by him to Sophia, was made known to her said husband, who appeared and consented to it, and afterwards, in the month of September, 1821, by writing, in which "the provision in the will" was expressed as the consideration thereof, transferred to him the said Lucinda.

He states, further, that he had not intended to give the possession of these negroes to Campbell, but that in the month of November, 1821, the complainants and their family came by his home on their way moving from Boone to Clay county, when John Hardeman, in view of their condition, suggested to him (respondent) the propriety of lending them Manuel and his family, in order to assist them in making a new farm in Clay—suggesting at the same time, that it would be the means of ascertaining whether the negroes would be content and satisfied to remain with them, as well as to enable him to judge whether the complainants were worthy of his bounty; and that being thus influenced, he loaned the negroes to the complainants, and took Campbell's bond for their return to him whenever requested by John Hardeman, who being the general agent of his father in the transaction of his home, and for the addi-

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tional reason that the respondent might *not* change the provision inserted in his will, it was thought proper to insert with power to protect either the interest of the respondent, or those of Mrs. Campbell and her children, against the possible consequences of her husband's misconduct, &c.

In the view we have taken of the case as presented by the record, it is unnecessary to embody more of the answer or the amended answer of this respondent, than that the complainants left with him the woman Lucinda at the time he loaned them Manuel and family; that Manuel and family came home to him by themselves, and that some short time after their return, Lucinda was delivered to John Thorp, who received her as the agent of the complainant, Campbell.

At the December term of the Howard circuit court, in the year 1829, the bill of the complainants being dismissed, they appealed to this court, which reversed the decree of dismissal and remanded the cause. Since then, the suit has been again tried in the Cooper circuit court, upon the original and much additional testimony subsequently furnished by both parties, so that there is perceived no discourtesy or irregularity in treating the record now before us, as one which has not heretofore received the consideration of this court.

Whilst the testimony as it now stands is somewhat conflicting and contradictory, it is not deemed to be of a nature either wholly irreconcilable, or of a character to overturn the explicit denials of the defendant's answer—the rule being that that can only be done by two witnesses, or one witness, and strong corroborating circumstances, implying, of course, in cases like the present, (where there are facts and circumstances on both sides) the *preponderance* of strong corroborating circumstances.

For the complainants, some of the witnesses testify to conversations they had with Thomas Hardeman, subsequent to the period when he made the disposition which has been stated of Manuel and his family, in which conversation he is represented as having *given* the negroes to his daughter, or to her husband Campbell. Grant this to be true, and yet, when considered in connexion with his answer, and with the other testimony in the case, it could mean nothing more than that that was the disposition he had made of them in his will, which will, however, he had the power either to change, annul or destroy at any subsequent period of his life, and which it is but fair to presume he did destroy, since it seems from his answer, made during his lifetime, that for reasons satisfactory to himself, he had given the property in question to other persons, in Tennessee. At all events, as there is nothing in the

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record even tending to establish such a will, and as it appears from the testimony that the woman, Lucinda, in consideration of the transfer of whom the provision *was to be* made in the will, was delivered up to the agent of the complainants after the return of Manuel and family, it cannot be reasonably or equitably contended, that the estate of Thomas Hardeman should be held liable under its alleged provisions, and even less that the estate of *John* Hardeman can be held liable, either for the mal-performance or non-performance of an alleged trust, which it is clear never had any legal existence.

This brings us to the letter which was written by John Hardeman to the complainant Campbell, and which, as it constitutes the only or main reliance for charging him as a fiduciary or trustee, it may be proper to copy entire. It is dated on the 6th of August, 1822, and is as follows:

Dr Brother—Mr. Burnett is now down at Glenn Owens' and says he has a letter for father, but has not yet delivered it; and as Manuel is also here, I write immediately to you, and send him back with the letter.

From the present situation of your affairs, it is certain you cannot derive any benefit from the negroes, and at the same time carry into effect my father's design in giving their use to my sister Sophia. His object was to have them kept together, and well treated, old and young. There now seems to be such a difference between you and them that they will not render you any service. It is therefore necessary for me to discharge my duty, and carry the trust into effect, by taking the negroes and hiring them out, and whatever sum of money their hire will produce, after having them well fed and clothed, and all expenses deducted, shall be paid to Sophia, as it shall from time to time be received by me. They will be put in a place where they can be together, and be well fed and well clothed in the first place, as this was the design and intention of my father in the origin of the trust. He wrote to Sophia some time ago, in answer to a letter from her by Mr. Thorp, which letter Manuel says has not been received by you. Since that time he has altered his opinion as it respects the separation of the children from their parents, and has determined to have nothing more to do with the business, unless you shall think it more profitable to return them, and take Dick and Lucinda, with the power of selling or using them as you may think proper, but this cannot be done unless you agree to it immediately, for in the fall they will be given away to another person who will be here at that time. You will counsel with Sophia and determine what is best, either to take Dick and Luce, and make them wait on you, or to have the others taken from you and put

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where they can be contented, and the net profits paid to her after they may be received, after deducting their food and clothing and other expenses. Please let me know immediately, and whether you agree to the change or not, bring or send them down as the expense will be more for me to come up after them. Should you agree to take Dick and Luce, with a bill of sale, you can take them back with you, should you come yourself, or should you send Manuel and his family by some other person, they can take up Dick and his wife to you. My father has told me to write to you, as he does not wish to be troubled any more about this or any other business, and I must carry *his wishes* into execution as far as I have the power. My opinion is that you would both be benefitted by the exchange, during your lives at least, as your personal labor would not then be so necessary as if the others were taken away and the hire paid to my sister once a year.

I hope you are both well and I am respectfully yours

Mr. Wm. Campbell.

JOHN HARDEMAN.

It will be seen that this letter was written at the instance or bidding of Thomas Hardeman, the owner of the slaves and the father of the respondent. From what motive he was influenced in directing the recall of the negroes he had loaned to the husband of his daughter, demonstrated as it seems to be, by the letter which he thus caused to be written by his son, (the respondent,) that up to that period at least he continued to cherish the purpose, (as it is apparent he retained the will,) to make these negroes, or others, in some manner available to his daughter, may perhaps be gathered from a letter of precedent date, addressed to him by Mrs. Campbell, but proved to be in the handwriting of a friend, who testifies that he wrote it at her request, and that it contained the substance of *repeated* conversations between Mrs. Campbell and himself in the presence of her husband. It is dated in Clay county, on the 31st of June, 1822, and runs as follows:

Dear and Reverend Father: With the almost insensible feelings of friendship and gratitude towards a benevolent parent, who in his wisdom has thought it proper (after seriously contemplating the subject,) to bestow upon me such a portion of wealth as it has pleased you to do, I feel myself humbly reconciled that your will is my pleasure, and that the situation in which the property stands, I fear will not prove to answer the ends which was intended by you when you made your last will, &c. The reason that I think it may be doubted, is, I very much fear that I shall not by any means be able to keep the negroes that it has been your pleasure to give me, as they both fight Mr. Campbell and me to the very last struggle. Manuel has bit Mr. Campbell's thumb,

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and Harriet has bit my thumb, and they say and bitterly swear that they never will stay with me. They both have threatened to take lives, and Manuel has made the attempt, and has once carried his butcher knife with the intent of murder, as he himself said. And as you, father, is getting old, and life is uncertain, the probability is that they may have to be sold, and if so, I wish them to be sold in your time, &c., and then you can, with your pleasure, and also your *will*, give to me in money, or in other negroes, such a portion as you think proper to do, and then I shall be satisfied; and if you should die, and the negroes be sold, and any jar should take place, I should not be satisfied, even if I should get twice as much as you yourself give me. I shall conclude and refer until I shall receive an answer to this. Your unworthy but affectionate child.

SOPHIA W. CAMPBELL.

THOS. HARDEMAN.

It is thus demonstrated, that up to the period of the re-delivery of the negroes in question, neither Campbell nor his wife even *pretended* that there was any other arrangement than the one in the will, or that that was either final or binding. Such is substantially the admission of their own letter, and such also the substance of their contemporaneous, continuous and concurrent conversations, as testified to by several of their most respectable neighbors and acquaintances in Clay county. It needs therefore, but a little attention to dates, and a little reflection upon the nature of the transaction we are reviewing, to perceive how natural it was for John Hardeman to speak of himself as a trustee in respect to the property in suit, without being in fact such, except contingently, under the will of his father, the substance of which the old man still then continued to cherish the purpose to stand by, but ultimately changed that purpose, as he had the sole and unquestionable *right* to do, as is admitted upon *every* hand. To assume upon such a state of facts as this, to hold a man responsible as trustee, in respect to property which another could reclaim absolutely and at his pleasure, and which he did reclaim *at the instance of the complainants themselves*, would be to affirm the proceedings and decree we are viewing, rendered (we will not doubt) upon the deferential yet mistaken assumption, that as the former decision of this court found the property to have been in the complainants, and the defendant, John, to have been a trustee for their benefit, and that of the heirs of Mrs. Campbell, the testimony subsequently introduced did not sufficiently vary the record of the facts to justify the subsequent chancellor in disregarding the original finding of our predecessors.

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There is much more in the record which might be referred to in concurrence with the conclusion we have arrived at, the letters of Campbell himself, written from Clay county to Thomas Hardeman, on the 25th of May, 1823, in which he *expressly* disclaimed that he ever had any legal right to the negroes, being but corroborative of the testimony of a number of gentlemen in that county, who testify freely and fully concerning his conversations, and from which it would seem that his *only* reliance was upon such provision as the father of his wife might *ultimately* make in his will. It may as well, perhaps, be added here, that we perceive nothing in the mutilated letter of the old man, *incompatible* with this, and therefore nothing which should deprive him of its ultimate benefit.

The whole array of family testimony is sufficiently reconcilable, and the whole case stands thus: Whatever is proven to have been said or written by Thomas Hardeman, as to having *given* the negroes in question to the complainants, was spoken or written pending his purpose to adhere to the provisions or the substance of the undelivered will of 1821; and whatever was written by John Hardeman, at the instance of his father, was dictated and written under the same circumstances. Neither of the complainants were ever imposed upon, or *in any sense* misimpressed, by what was thus said or written, for both of them, from first to last, are proven to have recognized the authority of the testator to modify or revoke his intended bequest, as he did, and to give to them, or withhold from them, according to the discretion which it seems he subsequently exercised. This being the case, and the negro woman, Lucinda, having been restored to them, (as already stated) there remains of the entire transaction nothing whatever to invoke either the interposition of a court of equity or a court of law.

The decree of the circuit court is accordingly reversed and the bill dismissed—the costs of the first trial in both courts to be paid by the defendants, and all subsequent costs by the complainants.

Judge Ryland, having been of counsel, not sitting.

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1. A sheriff's sale is within the statute of frauds, and the title to land can only pass by a deed duly executed: when a deed is made it relates back and takes effect from the sale only so far as to affect parties and privies, and not to defeat the rights of intervening purchasers.

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2. Plaintiff instituted his action of ejectment for the northwest fractional quarter of section 35, township 49, range 17; he offered in evidence, upon the trial, a deed through which he claimed title, which describes the land conveyed as an "interest in the *southeast* fractional quarter of fractional sec. 35, township 49, range 17, including part of the town of Boonville, on the south side of the Missouri river and in Cooper county," and in connection with the deed he offered to prove that the northwest quarter of the section was *fractional*, and was the only fractional quarter in the section; and that *part of the town of Boonville* was situated upon it, and that no part of the town was situated on the southeast quarter; all of which evidence the court excluded. Held that the evidence was properly excluded—that the description in the deed by metes and bounds as surveyed and numbered under the acts of Congress is the *particular* and *leading* description, and is sufficient to ascertain the premises, and the balance of the description should be rejected.

ERROR to Cooper Circuit Court.

LEONARD, for plaintiff in error.

1. The court erred in excluding the plaintiff's title, derived from the sheriff's sale of July, 1827.

2. The court erred in excluding the plaintiff's title, derived from Nowlin's deed of July, 1836. 1 Greenleaf's evidence, sec. 301 and notes; 3 Phil. Ev. 1376, Cow. & Hill's notes, note 942; Gates vs. Lewis, 7 Vermont Rep. 511; Loomis vs. Jackson, 19 John. Rep. 449; Worthington and others vs. Hylyer, 4 Mass. Rep. 196; Blaque vs. Gould, Cro. C. 447; Lush vs. Drux, 4 Wend. 318; Jackson vs. Clark, 7 John. 223; Jackson vs. Moore, 6 Cow. 706; McIvers Lessee vs. Walker and another, 9 Cranch, 178; Davis vs. Ransford, 17 Mass. R. 210; Jackson vs. Camp, 1 Cow. R. 612; Newsom vs. Prior, 7 Wheat. R. 10; Jackson vs. Wendall, 5 Wend. R. 147; Boardman vs. Reed and Ford's lessees, 6 Peters R. 345; White vs. Gay, 9 N. Hamp. R. 127; Long vs. Norton, 8 Greenleaf R. 68; Conolly vs. Vernon & Vyse, 5 East. Rep. 78; Fulwood vs. Graham, 1 Richardson's Rep. 491.

HAYDEN, for defendants in error.

1. The deed of trust, made by Hartt to Nowlin, on the 15th day of April, 1823, is a conditional deed, and did not, at the time it was made, invest Nowlin with a *then present* interest in the lands therein mentioned; but the vesting of an interest in him depended upon the condition, or the happening of the event therein specified; that is to say, upon the event that judgment should go (or be obtained against William S. Edwards and John Corum) in the respective suits then pending in the Cooper and Saline circuit courts against them, as the securities of Hartt to Turner in Hartt's bond for the conveyance of land to Turner, as is specified in the reciting part or caption of the deed; and, therefore, in order to show that Nowlin ever had any interest in the land, by virtue of the deed to him, it devolves upon the plaintiff in this suit, to show the happening of the event or condition precedent in the deed mentioned; and in this case, there is nothing in the record showing that the said event ever did happen.

This deed of trust is different from the usual deeds of trust as drawn in this country. In this deed, the interest in the land does not vest until the happening of the event, as a condition precedent, of a recovery in one of the suits mentioned; whereas deeds of trust usually convey the interest in *presenti*; but in neither form can the trustee foreclose the equity of redemption, until the condition in the deed is forfeited, and then, only in the way hereinafter mentioned.

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2. If the court shall decide that the vesting of the interest in Nowlin did not depend upon the event, as a precedent condition, mentioned in my first point, but shall decide that the interest vested at the time the deed was made, then I insist, that in either point of view, the power to sell the land is a conditional power, and that Nowlin had no right to exercise that power until the happening, as a condition precedent, of the aforesaid event; or upon the further condition mentioned in the deed, *yiz*: that Hartt should fail to make title to the said Turner to said land, or fail to keep said Corum and Edwards indemnified against damages and costs in said two suits, or cause them, by his acts, to be entirely released from their said liability as his said securities in said bond.

3. If the sale by Nowlin to Compton had been a sale of the northwest quarter, instead of the southeast quarter of section No. 35, in order to have thereby passed the title of Hartt to the land so sold, the trustee, Nowlin, was bound to observe and pursue, strictly and literally, the conditions and provisions of the deed; and that, if the sale were made, before the happening of the event, upon which his right to sell depended; or if he sold it before he sold the tract first charged with the burthen, as specified in the deed; or if the sale were made without having advertised the same for sale as required by the deed, then such sale would have been made without authority, and would have been void and have passed no right or title to Compton in the land, even though he had received, at the time of such purchase, a conveyance from Nowlin of the land. And, in order to recover in this action the land in controversy, it devolves upon the plaintiff to prove, and not upon the defendant to disprove that the sale by Nowlin, under which he claims, was made in conformity to the conditions, &c., mentioned in the deed of trust. See 2d Sugden on Powers, chap. 18, pp. 268, 269 and following, (top paging) and the authorities there referred to. 4th Kent; 1 Mo. Rep. 520; 7 John. Rep. 217, 226; 2 Pirtle's Digest, p. 91, title, "Mortgage and Mortgagee," sec. 36; 3 Little's Rep. 410, Ormsby vs. Farrasin; Story on Agency, secs. 164, 165; 4 Wheat. 79, Williams vs. Peyton; S. C. 4 Cond. Rep. 395; 6 Wheat. 119; 5 Cond. Rep. 28; 4th Cranch 403; 2 Cond. Rep. 151.

4. The deed of conveyance from Nowlin to Compton, dated on the 8th day of July, 1836, clearly and explicitly shows that Nowlin thereby intended to convey to Compton the southeast quarter of section No. 35, and not the northwest quarter of that section; and that it was his intention, thereby to consummate a sale of that identical tract, that is to say, the said southeast quarter which he had advertised publicly for sale, and sold on the 2nd day of Aug., in the year 1825, together with some two or three hundred other acres of land, for the price of two dollars to said Compton; and as the tract, specifically and plainly advertised and sold, is with certainty identified in the deed, it is not competent for the plaintiff, by evidence *aliundi*, to strike out the southeast quarter, and insert in its place in the deed, the northwest quarter of the section. The false affirmations in the deed, stating that the land described therein includes a part of the town of Boonville, when, in fact, it includes no part of the town—that it is a fractional quarter, when, in fact, it is not fractional, and that the sale of the quarter, so sold and described, was made by him, Nowlin, by virtue of the deed of trust, when, in fact, the deed of trust gave him no right or power to sell it, do not tend to prove, in the slightest degree, that the advertisement and sale was not of the identical tract designated in the deed, as the southeast quarter of the section. On the contrary, these statements only show (taken in connection with the proof of the facts as they exist,) that the land sold does not include any part of the town—that the quarter sold is not fractional, but a full quarter; and that, in fact, the sale of this quarter was not made by virtue of any right or authority in the deed of trust, for the deed gives him no such right or power. So that, I insist, that all these affirmations in the deed are made with a view, not to falsify the truth of what is certainly described as the quarter sold; but with a view to give greater certainty to the same identical quarter sold, and being false, are to be disregarded. Now, if Nowlin by his deed to Compton had stated, as the subject of the advertisement, that he had advertised and sold on the 2nd day of August, 1825, all the right, title and interest of George C. Hartt in "the Boonville tract," consisting of $3\frac{1}{8}$ eighths thereof, and that this, "the Boonville tract" included within it, the whole or any part of the southeast quarter of section 35, or that the court

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house in the town, or any other building or thing was situate thereon, when, in fact, these were false statements, still, the sale so made of "the Boonville tract" would carry his interest, &c., in this tract as "the Boonville tract" by its name and description specified in the deed.

I insist, that in the interpretation of the deed, the court is bound to take its clear and explicit language, and not what is in the country that contradicts the language, to ascertain what was intended to be sold and conveyed. To do this, where the meaning from the terms of the deed is clearly expressed, would be to give greater effect to parol evidence than to written, and, in fact, would be to establish a rule by which creditors and purchasers would be bound to look outside of a deed to know what it conveys, or was intended to convey by the party that made it. This rule never can obtain where there is no latent ambiguity in the instrument. I insist, that General Smith, the judgment creditor, and Adams, who purchased under the execution upon this judgment, had a right to know at the time of the levy and the execution sale, whether the land had been sold by Hartt, the debtor, or by Nowlin, the trustee, and that they were not bound to go beyond the recorder's office to ascertain that the land sold under the execution, (viz: the northwest quarter,) had not been sold by Hartt or by Nowlin.

I insist, that neither Smith nor Adams, was bound to go and survey the southeast quarter which was sold by Nowlin, to ascertain whether the whole or any part of the northwest quarter of the same section was within the southeast quarter, nor were they bound to survey the town of Boonville to ascertain whether any part of the town was included within the tract sold by Nowlin to Compton, in order to ascertain whether the northwest quarter could be sold to satisfy the judgment, and in which quarter, Hartt then had, at least, an equity of redemption.

I insist, further, that the very fact that the sale of the southeast quarter to Compton, for the price of fifty cents, is a circumstance which conduces, strongly, to show, that Nowlin knew at the time of the sale, as well as Compton, that he, Nowlin, had no right or power under the deed of trust to sell this quarter section, and hence, it was sold and purchased for nothing at this sale.

But if, upon any possible ground whatever, the deed from Nowlin to Compton, for the southeast quarter of section 35, by construction, can be tortured to mean, that the sale was of the northwest quarter of that section, (the land in controversy,) by reason of its stating that "it included a part of the town of Boonville," when it did not, then, I insist, that from the facts and circumstances, shown by the record, the purchase of the land at this sale was a purchase of Hartt in the name of Compton, to cover up the title to the land for the price of fifty cents, under a scheme, fraudulently concocted by Hartt and Compton to cheat and defraud the creditors of Hartt and subsequent purchasers of the land. Now, it may be that this view of the subject, as to the fraudulent character of this transaction, may not be entitled to much consideration in determining the question directly brought up before this court in the present proceeding; yet, it may deserve some consideration, so far as is involved the question in regard to the fact, whether at the time of this pretended sale to Compton, there was then any damages, costs or other injuries, resting up Edwards and Corum, as Hartt's securities, for whose indemnity the deed of trust to Nowlin was made, as above mentioned, and unless this indemnity was demanded under the provisions of the deed of trust, I repeat again, that the sale to Compton was not authorized; and may I not insist, that the very fact that Nowlin, the trustee, sold all the land on the south side of the river, (if the sale includes the land in controversy,) consisting of about $3\frac{1}{2}$ eighths of an one hundred and fifty eight acres, (which includes about forty lots in the town of Boonville,) and some two or three hundred acres in the neighborhood of the town, for the price of two dollars, much less than was reasonably necessary to pay the crier or auctioneer of the sales upon the premises, (as required to be made by the deed of trust;) and that the deed of trust had in fact been satisfied, and that no indemnity was needed. For why, I ask, should this lien, if it existed upon the land, be

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thrown away and costs be incurred in printing advertisements of the sales, &c., &c., if the object were to realize the indemnity pretended. Now, I can readily imagine how a trustee might be prevailed upon, by the maker of such a deed of trust, by one in the situation of Hartt, with judgments hanging over him, (such trustee not thinking or knowing what object such an embarrassed seducer had at the time in view,) to advertise and sell land, as the trustee in this case made the sale.

As to the question of varying the descriptive identity of the land, as stated in the deed, &c., see 1 Greenleaf, Ev. sect. 301, and authorities referred to; 3 Earbrow's Rep., 218, 219; 5 Hill Rep., 272; 6 N. Hamp. Rep., 205; 7 John. 247, 226.

5. I insist, that even if the sale by Nowlin to Compton had been warranted and made in strict conformity to the provisions, &c., specified for his government in the deed of trust, then, the sale which was made on the 2nd day of August, 1825, by Nowlin to Compton, and which was not evidenced by a deed to Compton, pursuant to such sale, and the same duly recorded, prior to the execution sale to Adams, (under Smith's judgment,) is void as against the title of Adams thus acquired.

That the deed to Compton, made by the trustee, Nowlin, (seven years after Adams had purchased the land,) to consummate the trustee's sale in August, 1825, cannot overreach Adams' title by relation. That although Adams might have seen, and by construction of law, did know, in the year, 1829, when he purchased the land, that the same was encumbered by the deed of trust to Nowlin, yet, as nothing appeared upon the record showing that the equity of redemption of Hartt was or had been foreclosed by a sale under that deed by Nowlin to Compton, and that there was, therefore, a vendible interest (the equity of redemption) still remaining in Hartt, subject to the judgment and execution of Smith; he, Adams, had a right to purchase, at least, that interest under the execution, and consequently, so far as this unconsummated and mysterious sale made to Compton, in the year 1825, is concerned, the deed afterwards made in the year 1836, does not increase its strength or validity as against the title of Adams. 20 John. 537; 18 John. 293.

Then, the question is presented, what effect can this deed have as a transfer of Hartt's interest in the land in controversy, either at the time it was made, or at any other time? I answer, that it can have none. It does not even amount to an assignment of the deed of trust; but if it did, it would be a nullity, as an assignment of the deed of trust without the debt or the thing secured by it is a nullity—the debt being the principal and the trust deed the incident. See the following authorities: 2 Pirtle sec. 23, p. 89, 90; 2 Marshall, 109; 2 Barrows's Rep., 978; 6 N. Hamp. R., 210.

ADAMS, for defendants in error.

1. The patent, read in evidence by the plaintiff, is void so far as the northwest fractional quarter of section 35, township 49, range 17 is concerned, the same not being connected to the other lands in the manner required by the pre-emption law under which Hanna Cole's pre-emption was granted. See act congress, approved 29th April, 1816, vol. Land Laws, 281, 282.

2. A sheriff's sale is within the statute of frauds, and the title can only pass by a deed duly executed; and a deed, executed subsequently to the sale, will not pass the title and relate back so as to defeat intervening purchasers, and, therefore, the sheriff's sale to Compton, and the amendment of the sheriff's return, and the subsequent deed of the sheriff, Woodward, to Compton, and the evidence offered in connexion therewith, were properly excluded. See *Evans vs. Ashley*, 8 Mo. R., 177; *Simonds vs. Catlin*, 2 Caine's Rep., 61; *Jackson vs. Catlin*, 2 Johns. Rep., 248; *Catlin vs. Jackson*, 8 Johns. R. 520; *Ennis vs. Waller*, 3 Blackford Rep., 472; 13 I. R., 472; 4 Cow., 462; 3 Cow., 79.

3. The court properly excluded the deed to Nowlin and from Nowlin to Compton, and

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from Compton to Hartt, and the evidence given in connexion therewith. *First.* Because the deed to Nowlin was made upon a condition precedent, that is to say, no estate was to vest unless the judgments referred to in the deed, should be rendered, and no evidence was given to show that these judgments ever were rendered, and without this proof, as the case stands upon the record, an insurmountable objection exists to the admissibility of the evidence rejected. *Secondly.* But the main point upon which this evidence was rejected, and upon which the defendants in error confidently rely, is, that the deed from Nowlin to Compton did not embrace the land in controversy, and the plaintiff had no right, by evidence aliundi, to exclude from that deed the southeast quarter of section 35, township 49, range 17, and put in its place the northwest fractional quarter of that section. The deed, as it stood, contained a perfect description of the southeast quarter, and the false particulars referred to in the deed, to-wit: "fractional" and "including a part of the town of Boonville" might be rejected and leave a perfect description, and this is the proper rule of construction in such cases. You cannot reject the description of premises in a deed and incorporate other premises by another description. See 1 Greenleaf's Ev. section 301, and note 1, and authorities there referred to; 7 John. R., 217, 226; 6 N. Hamp. R., 205; 3 Barbour's Rep., 218, 219; 5 Hill Rep., 272.

The certificate of sale made by Nowlin to Compton, was not evidence. It was not a deed of conveyance, and of course passed no title. It could not be used to charge or alter the description in the deed by Nowlin to Compton, or to show that there was a mistake therein. It would not be good evidence for this purpose, even in a court of equity, or bill for the correction of a mistake—because the deed recites another and different sale than the one referred to in this certificate. The certificate is of a sale that was made on the 1st of September, 1825, and the deed is made pursuant to a sale that was made the 2nd of August, 1825. So, if the certificate proved anything, it would prove that there was no mistake, and that the deed had been made for the land actually sold on the 2nd of August, 1825, which was a different sale from the one referred to in the certificate. See 7 Mo. Rep., 337; Moss vs. Anderson.

4. But the sale by Nowlin, as trustee, even if the deed had been for the proper piece of land, was void because he did not pursue the *trust and power* according to the terms of the deed. The deed required him to sell the lands as they were named in the deed, which he omitted to do. 1 Mo. Rep., 520; Jackson vs. Clark, 7 Johnson's R., 217, 226; 2 Pirtles' Dig. Title "Mortgage" sec. 36, p. 91; 3 Littell, 410, Ormsby vs. Tarason; Story on Agency, sec. 164, 165, 126, 133; 7 T. R., 348; 5 Johns. R., 58; 3 Pick., 488-9, 490-1; 16 Mass. R., 345; 7 Johns. Rep., 279, 288; 1 Cow. 122; 3 Johns. 386; Adams on Eject, p. 30, n. 3; see Minott's Digest. "Mortgager and Mortgagee."

5. As there was no record of the sale or deed from Nowlin to Compton, it could not affect the title vested in Adams by the execution sale to him; and even if the deed had been made for the land in controversy, it would have amounted to nothing more than the assignment of the mortgage without assigning the debt and would have been a nullity. See 2 Pirtle's Dig., sec. 23, pp. 89, 90; 2 Marshall 109; 2 Barrow's R., 978; 6 N. Hamp. R., 210.

6. The original deed of trust to Nowlin ought to have been produced, or in connexion with its loss it should have been shown that it contained no endorsement of satisfaction, for if it was satisfied (and the production of the original might have shown that fact) no release was necessary to re-invest the mortgagor with the title, which, of course, was transferred to Adams by the execution sale and sheriff's deed to him. Jackson vs. Davis, 18 J. R. 7.

RYLAND, Judge, delivered the opinion of the court.

This was an action of ejectment tried in the Cooper circuit court, in which the plaintiff suffered a non-suit, on account of the rejection of certain evidence of title that he offered.

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The cause has been twice before in this court. It was brought here in August, 1842, by the plaintiff and was reversed. See Hartt vs. Rector, 7 Mo. Rep. 531.

The plaintiff had a verdict at the next trial, which took place in 1843, and judgment thereon, which was reversed by this court in January, 1844. See Rector vs. Hartt, 8 Mo. Rep. 448.

Upon the last trial, which took place in September, 1847, the plaintiff gave as evidence of title a patent from the United States to himself, Carroll & Wallace, dated the 19th November, 1822.

In answer to this title, the defendants gave in evidence a judgment of this court, of the 15th April, 1823, in favor of Thomas A. Smith, against George C. Hartt and George Tennell; an execution on this judgment of the 10th October, 1828, and a sheriff's sale and conveyance of the 17th February, 1829, to William M. Adams, for the whole quarter section; also, conveyances from Adams to the defendants for the lot in controversy.

The plaintiff, in reply, then gave in evidence two judgments of the Cooper circuit court, against the plaintiff; one of the 26th January, 1821, in favor of G. James, and the other of the 21st May, 1821, in favor of N. Nicholds: executions thereon of the 9th of August, 1823; a levy upon Hartt's interest in "the Boonville tract," being $3\frac{1}{2}$ eighths; a *venditioni exponas* of the 22nd of July, 1824; a sheriff's sale thereunder of Hartt's interest in the Boonville tract made in July, 1824; an amended sheriff's return to the *venditioni exponas*, made in October, 1836, and a sheriff's deed of the 27th of October, 1836, to Geeshom Compton, of the land sold under the *venditioni exponas* and the acknowledgment and registry of this deed.

The original return to the writ of *venditioni exponas* stated the fact of the sale and payment of the purchase money, but omitted to state the name of the purchaser, and this was supplied by the amended return.

The sheriff's deed was made upon the petition of Compton, by order of the Cooper circuit court, by the successor in office of the sheriff who made the sale.

The plaintiff then offered to prove, that at the time of the original levy and sale, the expression "Boonville tract" was well known in the neighborhood as the northwest fractional quarter of section thirty-five, (35), township forty-nine, (49), range seventeen (17), (the land sued for) and that this tract had acquired the appellation of the "Boonville tract," and was known by that description.

To this evidence, both written and verbal, the defendants objected,

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and the court sustained the objection, and rejected the evidence thus given by the plaintiff in reply.

The plaintiff then proved and read in evidence the following title paper: A conveyance of the 15th of April, 1823, from himself to Peyton Nowlin, acknowledged and recorded in Cooper county, on the 11th day of July, 1823, of his "undivided interest in and to three and one-half eighths of the northwest fractional quarter of section 35, township 49, range 17, south of Missouri river, in trust to secure the payment of certain demands." A writing of the 1st of September, 1825, executed by Nowlin, the trustee, stating the fact of the sale of the several tracts of land included in Hartt's deed of trust, to whom made, and the price given, in which it was stated that "the 3 1/2 eighths of the N. W. fr. 1-4 of section 35, township 49, range 17, including part of the town of Boonville, was sold to Geeshom Compton. A conveyance on the 8th July, 1836, from Nowlin, the trustee, to Geeshom for several tracts of land included in the deed of trust and described in the certificate of sale as having been sold to Compton.

In this deed, the land in dispute is described, after reciting the deed of trust and the sale made under it, as all Hartt's "interest in the south east fractional quarter of fractional section 35, township 49, range 17, including part of the town of Boonville, on the south side of the Missouri river and in Cooper county." The deed declares that the trustee sells such interest in these lands as he acquired under Hartt's deed of trust and no more; a conveyance of the 15th of May, 1837, from Compton to Hartt of the land in controversy.

The plaintiff then proved, that the N. W. quarter was fractional, and made so by the Missouri river, and the only fractional quarter in the section; that a part of the town of Boonville was situated upon it, and that no part of the town was situated on the southeast quarter.

All the evidence of title was objected to by the defendants, and was excluded by the court, and thereupon the plaintiff suffered a non-suit.

The plaintiff afterwards moved the court to set aside this non-suit, which motion the court overruled, and the plaintiff brings this cause here by writ of error.

To reverse the judgment of the circuit court, the plaintiff in error relies mainly on two grounds.

First, That the court erred in excluding his evidence of title, derived under the sheriff's sale in July, 1824, and the sheriff's deed in pursuance of this sale, dated 27th October, 1836.

Second, That the court erred in excluding the plaintiff's evidence of title, derived from Nowlin's deed of July, 1836.

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It therefore becomes necessary for me to examine these propositions, and if I find the law arising on either one to be for the plaintiff, then the cause will have to be remanded.

I am relieved from all necessity of investigating the point first above set down. The principle stated by this court in the case of *Alexander & Betts vs. Samuel Merry*, (9 Mo. Rep. 515) are conclusive upon this point. I shall therefore pass it by with merely stating that in accordance with these principles, the circuit court did right in rejecting all the evidence offered by plaintiff below in regard to the same.

The second point is of much more difficult adjudication. The mistake as is alleged in the deed from Nowlin to Hartt. This deed is for the southeast fractional quarter of fractional section 35, township 49, range 17, including part of the town of Boonville, on the south side of the Missouri river, in Cooper county. The plaintiff contends that it was intended for the northwest quarter, and not the southeast, and he offers to show and prove this by evidence, showing that the southeast quarter is not fractional, and that no part of the town of Boonville is situated on it; but that the northwest quarter is fractional, and is the only quarter that is fractional in said section, and that a part of the town of Boonville is situated on it. Many authorities are cited by the plaintiff's counsel, as well as by the defendant's, on this subject.

Greenleaf, in his treatise on the Law of Evidence, 1 vol. 332, § 301, and in the notes thereto, has laid down a general, and I think, a correct view of this subject. *Falsa demonstratio non nocet, cum de corpore constat*. This, says he, is the rule derived from the civil law. So much of the description as is false, is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application.

Words necessary to ascertain the premises must be retained, but words not necessary for that purpose may be rejected, if inconsistent with others.

That an uncertainty which arises from applying the description contained in the will, either to the thing devised or to the person of the devisee, may be helped by parol evidence, but, that a new subject matter of devise or a new devisee, where the will is entirely silent upon either, cannot be imported, by parol evidence, into the will itself. This is laid down as the doctrine concerning wills. The plaintiff seeks that it may be applied to the deed in this case. Be it so.

By the acts of Congress, the public lands in the new States and Territories have been surveyed and laid off in townships, ranges, sections, and the various sub-divisions of sections—such as half sections, quar-

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ter sections, half quarter sections and quarter quarter sections; and the United States grant their patents, and have them issued for lands thus marked, bounded and described. A principal meridian line is laid down, then townships and ranges, so that a person of ordinary capacity can designate the tracts and point out the lands and the various sub-divisions; and he knows just as well what specific tract or parcel of land is pointed out by the description of the south-east fractional quarter of section 35, township 49, range 17, west, south of Missouri river, as if the external lines and corners thereof had been run and marked and platted down by the surveyor. Such a description is nothing more nor less than a description of the land by metes and bounds.

The deed in this case is for the south-east fractional quarter. It turns out that this quarter is not fractional. Must we, therefore, conclude that the deed is void? Let us reject the word fractional, which is in this instance the *falsa demonstratio*, of the civilians and enough will still remain to convey the premises.

No part of the town of Boonville is situated upon it: reject this false demonstration and enough still remains to convey the premises mentioned in the deed.

It is contended for the plaintiff in error, that we must look to the words "*fractional quarter*," and on which a part of the town of Boonville is situated," as the particular description, and as such, must control the description of metes and bounds, thereby overturning the descriptive words, south-east fractional quarter of section 35, township 49, range 17, west, south of Missouri river.

But this construction is contrary to all rules and would overturn the settled and long established modes by which we designate our tracts or parcels of land.

When we sell by the descriptive terms of south-east fractional quarter of section 35, in township 49, of range 17, west, south Missouri river, we specify and describe as particularly as if we marked out the boundaries and described each line and specified each corner. If it be not "*fractional*," or if no part of the town of Boonville be included in these lines, then these descriptive specifications, thus wanting, become what the civilians call *falsa demonstratio*, and must be rejected, nevertheless enough still remains to pass the land by the deed.

On the other hand, let these descriptive specifications, thus wanting, become the governing and controlling descriptive words, and the incident will prevail over the principal, an absurdity into which I am unwilling to be driven.

Were I to convey by deed a lot in the city of Boonville, and describe

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it as lot number ten, in block number five, on the plat of said town, said lot number ten fronting on Main street, sixty feet, and running back one hundred feet to an alley fifteen feet wide, now in the possession of A. B., and it should afterwards turn out that A. B. never was in possession of said lot, but was in possession of an adjoining lot number eleven, of the same dimensions; can it be maintained that the specification of the possession must control the other descriptive words in this deed, so as to authorise the courts to suffer parol evidence to prove that lot number eleven was meant to be conveyed in this deed instead of lot number ten? See the case of Goodlittle vs. Southern, 1 M. & S. 299.

Upon the whole case, I am clear that the law, on the second point, as well as on the first, was properly ruled by the court below for the defendants.

The point about the condition precedent, in the deed of trust to Nowlin, we consider not necessary to be now passed on by this court.

Judge Napton concurring with me in this opinion, the judgment of the Cooper circuit court is affirmed.

PATTERSON vs. J. & J. McCLANAHAN.

1. Although instructions asked by a party and refused by the circuit court assert correct legal principles, according to the facts assumed by them, yet if the jury by their verdict have negatived the hypothesis upon which the instructions were based, the supreme court will not interfere with the judgment.
2. Where the objection to evidence goes to the *sufficiency* of the proof, and not to its *competency* or *relevancy*, it is matter for the determination of the jury.

ERROR to Callaway Circuit Court.**STATEMENT OF THE CASE.**

This cause was commenced in the Callaway circuit court by plaintiff, by petition founded on a promissory note for \$250 00, dated August 25th, 1848, upon twelve months time, payable to Benjamin F. Watkins, and by him assigned to plaintiff. Defendants filed their answer at the October term, 1849, and set up therein the following defence to the merits of the action, to-wit: "that the promissory note sued on, was given upon the purchase by the defendants, from the payee of the note, on or about the 25th day of August, 1848, of Lewis and Johnson's atmospheric churn for the county of Boone in this State, and upon this sale the

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payee falsely and fraudulently represented to the defendants that the churn would, with cream, in good order, turn out a first rate article of butter in five or ten minutes, and with new milk in fifteen or twenty minutes, and was superior to any other churn; and the defendants, relying upon these representations, made the purchase, when in truth, the churn would not, with cream in good order, turn out a good article of butter in five or ten minutes, nor with new milk in fifteen or twenty minutes, nor was it superior to any other churn, but was useless and unfit for the purpose for which it was intended—inferior to the churn in common use and of no value." In their answer, defendants further stated that they file with their answer, the bill of sale of the churn made to the defendants by the description of John McClanahan & Co. A trial was had at the April term, 1850, at which the cause was dismissed as to Hance and Griffith, and the jury empannelled in the cause found for defendants.

At the trial the plaintiff gave the note in evidence and testimony to establish the assignment thereof by Watkins to plaintiff, when plaintiff rested his case. Defendants introduced witness Parker, who stated that about the time of the date of the note, Watkins showed him the note, and asked him about the solvency of the makers, and that about the same time he showed witness the bill of sale executed to John McClanahan & Co., and acknowledged the signature to be his, and witness attested it. Witness had never seen Watkins in Fulton before or since, and that defendants lived there. Defendants offered to read the bill of sale to the jury, but plaintiff objected, because defendants had not proven that the makers of the note composed the firm to whom the bill of sale was made. The court overruled the objection of plaintiff, and permitted the bill of sale to be read to the jury, to which the plaintiff excepted. Defendants showed by this witness, that before and about the time of the date of the note, he saw such a printed notice as the one shown witness, stuck up in Tuckers' tavern and on the corner of Henderson's store in town. The notice represented that the churn would, with cream in good order, turn out a first rate article of butter in five or ten minutes, and with new milk in fifteen or twenty. Defendants offered to read the printed notice in evidence, to the reading of which plaintiff objected, because the same would be evidence irrelevant, illegal, and not pertinent to the issue; but the objection was overruled by the court, who permitted the notice to be read to the jury, and the plaintiff excepted. Defendants offered to prove by witness that he heard Watkins make representations as to said atmospheric churn, similar to those contained in the notice, in the streets, stores and shops of the town, to the giving of which evidence plaintiff objected, but his objection was overruled by the court, and the plaintiff excepted. Witness heard Watkins in Tucker, Harris & Co.'s store represent what the churn would do, similar to and stronger than those contained in the notice—that Thomas Harris, D. M. Tucker, witness, and perhaps Wm. Tucker, were present. Witness heard Watkins make similar representations in Nolley's shop, witness, Nolley and Watkins being all that were present. Witness heard Watkins in various other places make representations as to the merits of said churn—does not remember who were present. Some of the conversations and representations were made before the sale, and when Watkins first came to Fulton. Witness states that Griffin, one of the obligors in the note, was present frequently at these conversations.

Thomas Curd thinks he saw Watkins stick up on Henderson's brick store a printed notice, having very much the appearance both of character of print and color of paper as the one shown witness. He read it and as he now remembers this is to the same purport as that. He states that Watkins tried to sell witness a churn for some county. Defendants offered to prove by this witness that at that time, Watkins had in possession and showed to witness printed notices just like the one now shown witness. Plaintiff objected because it would be evidence irrelevant and illegal and ought not to go to the jury; but the objection was overruled and the evidence was given, to which the plaintiff excepted.

David McKee saw a printed notice sticking up. He tried a churn got of Dyer, with cream but got no butter—he tried it with new milk but got no butter. In a common churn he made butter from both the cream and new milk.

David G. Henderson had read a printed notice of the atmospheric churn. He got a churn of

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Dyer, and with cream in good order made a sort of butter in twenty minutes—tried it again but got no butter. The milk in a cedar churn made butter. The butter made by the atmospheric churn was not a merchantable article.

James H. Jamison had some cream churned in an atmospheric churn got of Dyer; it was churned an half hour, when some butter, not as good as made by a common churn was got.

This was all the evidence given by the parties. Plaintiff asked the court to instruct the jury as follows:

1. Before the jury can find for defendants, they must find that said Watkins, before or at the time of the sale of Lewis & Johnson's atmospheric churn for the county of Boone, was made to said defendants, James and John McClanahan, made the representations stated in defendant's answer, with regard to the said churn, to said defendants, and that the defendants, relying upon these representations, made the purchase, and that such purchase was the consideration of this note.

2. That if the jury find that said Lewis & Johnson's atmospheric churn, for the county of Boone was of any value, they must find for plaintiff; and if they find for plaintiff they must find for the full amount of the note.

3. That if the jury find the said churn to be of any value, they have no power to fix what they might think to be the value of the same, but must find for plaintiff the whole amount due on said note.

The court gave the first instruction, but refused to give the second and third, to which opinion of the court in refusing to give the second and third instructions the plaintiff excepted. The jury found for defendants and the plaintiff moved for a new trial, which being overruled, the case is brought to this court by writ of error.

HARDIN & REED, for plaintiff in error.

1. It was error in the court to permit the bill of sale to be read to the jury as evidence, before it was sufficiently shown what persons composed the firm of John McClanahan & Co., to whom it was executed. This was not done, nor was it attempted. It was necessary for defendants to prove strictly that they were partners composing the firm described. 2 Stark. 801; 7 Mo. Rep. 561, Lockridge vs. Pilcher and Wilson.

2. The court committed error in permitting the printed notice to be read to the jury as evidence, and in permitting witness Parker to testify as to what he heard Watkins represent the qualities of the churn to be at the various times spoken of by the witness.

3. The contents of printed notices stuck up in the town and of those seen in the possession of Watkins, ought not to have been given to the jury, until the proper foundation had been laid. 1 Phil. Ev. 452; 3 Phil. Ev. 1207 and 1214; 1 Stark. 317.

4. The 2nd and 3rd instructions of plaintiff, ought to have been given by the court.

5. A new trial ought to have been granted to plaintiff.

ANSELL, for defendants in error.

1. If the fraud or breach of warranty goes to the entire consideration, it may be plead or given in evidence in bar to an action for the purchase money of an article sold. Ferguson vs. Huston, 6 Mo. R. 414.

2. Fraud or partial failure of consideration may be given in evidence in a suit for the purchase money of an article sold, in mitigation of damages to avoid circuity of action. 15 Johns. R. 230, Still vs. Rood; 13 Johns. R. 302, Beeker vs. Vrooman; 8 Cowen, 31, Hills vs. Bannister; 2 Wend. 431, Spalding vs. Vandercook; 3 Wend. 236, Benton vs. Stewart; 4 Wend. 483, McAllister vs. Reab; 22 Pick. 510, Harrington vs. Stratton; 6 Mo. R. 414, Ferguson vs. Huston; 7 Mo. R. 510, Wade vs. Scott; Story on contracts, page 107, sec. 171 to 176; Story's Eq. Fraud, sec. 191 to 195.

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NAPTON, J., delivered the opinion of the court.

The principal error assigned in this case is the refusal of the court to give the two last instructions asked by the plaintiff.

This action was upon a note given in consideration of the purchase of a patent right for atmospheric churns, and the defendants attempted on the trial to satisfy the jury that this patent right was valueless. No instructions were asked by the defendants and none were given, except the one asked by the plaintiff, and to which, of course, no objections can now be taken. In the present condition of the case, with a verdict for the defendants found under an instruction given at the instance of the plaintiff, the second and third instructions asked by the plaintiff would seem to be mere abstractions. The jury by their verdict have determined that the atmospheric churn was of no value; it becomes a mere abstraction to enquire now what the law would be, in the event that the patent churn was found to be of some value. It is, in other words, useless to enquire whether a partial failure of a note is a good defence at law to an action upon the note, since the jury have in this case, under an instruction asked by the plaintiff, found a total failure. The plaintiff desired the court to instruct the jury that they must find a general verdict for the defendants, or for the plaintiff, and that they could not take note of any mere partial failure in the consideration of the note. The court refused to give such instructions, but the jury have found generally for the defendants. If therefore the instructions asked by the plaintiff were the law, of what avail could they have been to him, since the jury by their verdict have negatived the hypothesis upon which those instructions were based?

¶ Objections were taken to all the testimony introduced at the trial by the defendants, for the purpose of proving the consideration of the note, and the failure, total or partial, of that consideration. None of these objections seem to be relied on here, except the one made to the introduction of the bill of sale from Watkins to McClanahan & Co. The objection to this paper was that no proof was offered previously to its introduction, to show that the makers of the note sued on constituted the firm of John McClanahan & Co., to whom the bill of sale was made. We cannot perceive the force of this objection. The suit was not upon this bill of sale, it was a mere collateral paper, introduced for the purpose of explaining the transaction which led to the note, which was the subject of the suit. The objection goes to the sufficiency of the proof, not to its competency or relevancy, and this was for the jury. The other judges concurring, the judgment of the circuit court is affirmed.

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1. Testator died in the State of Kentucky, having devised his real estate to his widow during life or widowhood; by legislative and judicial proceedings had in that State, the widow was empowered to sell the land and invest the proceeds in lands in this State. Held, that the money in the hands of the widow is to be regarded as real estate.
2. A trustee cannot prove by parol testimony, without the aid of the record of the suit itself, the amount of costs incurred in a suit instituted by him to recover the trust money.
3. Where a trustee is required by the terms of the trust to invest a specific amount of money in lands, he is not warranted in investing part as directed, and expending the balance in improving the land purchased, unless peculiar circumstances should require it.
4. If no exception be taken to the decision of the circuit court at the time it is made, the supreme court will not review it.
5. Where by the terms of the trust the trustee is required to invest a certain amount of money in funds for the benefit of persons, part of whom are minors, he should be required to invest the full amount, although a portion of those of full age request to receive their shares in money.

ERROR to Morgan Circuit Court.

ROBARDS, for plaintiff in error.

1. The court erred in not permitting the defendant, Gist, to prove the amount of costs and expenses paid by her in recovering the money which she held as trustee.
2. The court ought to have required S. P. Hunter to testify as a witness when called upon by the defendants.
3. The court ought to have heard the defendants motion filed, to suppress the deposition of Butler.
4. The decree of the court is palpably against the rights of Mary Gist. The decree finds the facts to be that Michael Chism died leaving eight children living. He devised all his real estate to his widow, the said Mary Gist, during widowhood. That subsequently to his death, his daughter, Sarah, died. That the widow married; then the estate under the will passed to his children and their heirs. The deceased gives to the seven surviving children each a seventh of the whole estate, and to the widow only a life estate in one third. When, in truth, from the facts found to exist by the decree, the estate ought to have been divided into eight parts, giving to each an eighth and the inheritance (one eighth) of Sarah, who died since her father, should have been distributed to the surviving brothers and sisters and to her mother, the said Gist, in equal parts; the decree only gives to Mary Gist a dower interest of one-third part during life, when by the facts set forth in the decree as found, she is entitled absolutely to one-eighth of Sarah's interest in addition to dower. In this there is manifest error to the prejudice of Mrs. Gist. Fonblanques Equ. 298, top paging note, 420; 3 Wheaton. 563, 577.
5. The court should not have required Mary Gist to invest any more of the money found in her hands than the shares of the petitioners; and should have permitted the defendants to

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receive their part in money. 2 Powell on Devises, p. 37, and cases referred to; 2 Story, pages 101 '2.

6. The court should have sustained the demurrer to the petition. True, it is a petition under the new act, but is a proceeding really under the partition act, and by law no other separate and independent subject should have been blended with the cause of partition.

ADAMS & HAYDEN, for defendants in error.

Judge BIRCH delivered the opinion of the court.

In the year 1835, Michael Chism departed this life in the county of Monroe and State of Kentucky, leaving a will by which his wife, Mary, (since intermarried, and now Mary Gist, one of the defendants in this suit,) was to inherit and hold all his real estate during her widowhood, but in case of her marriage, to take only a dower or life interest of one-third.

Under the authority of an act of the legislature of Kentucky, the sale which the widow had previously made of the lands in that State, seems to have been so agreed upon and confirmed by judicial proceedings there, as to require the investment of the proceeds in lands in this State for the benefit of the heirs, reserving to the widow (who married again some time afterwards) the dower or life interest alluded to.

The sum to be thus invested was eighteen hundred dollars, and the point of complaint in the petition by which the suit was commenced by a portion of the heirs against the widow, and another portion of them, is, that a part of the money has not been invested at all, and that by fraud and collusion between Mrs. Gist (again a widow) and Stephenson Gates, (who married one of the heirs and is one of the defendants,) five hundred and thirty-six dollars of the proceeds of the Kentucky land was applied to the purchase of eighty acres of land from Gates, while the same was, in fact, worth less than one hundred dollars. The petition seeks to set aside this investment, for fraud, to compel a faithful investment of the whole remaining sum, and to partition amongst the heirs certain other lands which had been fairly purchased with a portion of the Kentucky money alluded to.

The decree of the court below was as prayed for, and as the *evidence* upon which it was rendered was amply sufficient to justify it, we will notice only the points of *law* presented by the record.

There can of course be no serious question, that both upon reason and authority, the bequest in the will, although having passed into money under the proceedings in Kentucky, must still be regarded (as the legislature and the court there obviously designed it should be) in the

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nature of landed or real, instead of personal estate—the rule being that “equity will consider things directed or agreed to be done as having been actually performed, where nothing has intervened to prevent a performance.” (3. Wheaton, 578.)

It is complained of, in the next place, that the court refused to hear testimony showing the amount of costs and expenses incurred by Mrs. Gist, in prosecuting a suit in Kentucky for a recovery of a portion of the money which was to be invested in this State. To this it is sufficient to answer, that the circuit judge could not do otherwise than decline to hear the mere oral testimony which was offered respecting an alleged fact, which it was so easy to have verified, or at least to have laid a *foundation* for verifying, by the better testimony of the record of the suit itself, including the bill of cost, and then such oral testimony, in explanation or application, as might have been admissible under the rules of evidence.

It is secondly objected, that the court refused to require Hunter, the father and guardian of two of the infant petitioners, to testify in the case at the instance of the defendants. Gates (one of the defendants) made affidavit that they expected to prove by Hunter, that he (Hunter) was instrumental in collecting the money directed to be invested in Missouri lands—the expense incurred in collecting it and transmitting it to the State—that all of it except about the sum of \$527, had been invested in lands here, which the heirs had acknowledged by a writing in his possession—and that he (Hunter) had then but recently paid over to Mrs. Gist the residue of said money, which was relied upon as an excuse for not having invested it.

It is deemed unnecessary to enquire or decide to what extent Hunter would or would not have been a competent witness upon the points thus stated, inasmuch as it appears from the bill of exceptions, that “before the cause was disposed of, the respondent’s counsel was informed that the objection to the examination of said Hunter had been withdrawn, and that the court was ready to hear his testimony.” Of course the witness was yet present in court, (or the bill of exceptions would have been otherwise worded,) and the cause should not be reversed and sent back merely to enable the defendants to introduce a witness as a matter of *right*, which had already been conceded to them as a matter of *privilege*. Such a course would be carrying a mere technicality beyond both the substance and the right.

To the objection that the court refused to hear testimony tending to show the amount of money expended in permanent improvements upon other lands purchased with a portion of the proceeds of the Kentucky

estate, it is sufficient that neither in the will, in the act of the legislature, in the Kentucky decree, or elsewhere, is there found the slightest direct authority to make such expenditure, nor does it seem to be pretended that there were any peculiar circumstances which required, or would even excuse such an expenditure, if indeed, any such was really made.

The objection which is raised to the action of the court, in refusing to entertain the defendant's motion to suppress the deposition of Butler, is not only well enough answered by the counsel for the defendants in error, (assigning that under the rules of the court in which the trial was pending, the motion was made too late,) but it is perceived, also, that no exception was taken at the time to the decision of the court below, nor any further objection made to the reading of the deposition. We need scarcely refer to the numerous adjudications of this court upon both of these points.

The sixth and seventh reasons assigned by the counsel for the appellant, for granting a new trial may be considered together, being to the effect that the court should not have required Mrs. Gist to invest any more of the money found in her hands than the shares of the petitioners; and should have permitted the defendants to have received their part in money. Also, that the court should have sustained the demurrer to the petition, which, although proceeding under the new practice act, it is alleged was in fact a proceeding under the partition act, in conformity to which no other subject could be blended with the prayer for partition.

Upon looking into the decree, it is discovered that the chancellor directs that the shares of the objecting heirs be set off together, if it can be so done without detriment to the estate; so that the question upon this point, when considered in connection with what has been already said as to the continuing nature of this estate, (partitionable) resolves itself into the naked enquiry, whether the satisfaction expressed by a portion of the heirs, and *their* disinclination to any partition or division, should conclude the discretion of the chancellor as to the rights of the infant and other petitioners? We not only think otherwise, but that in the case before us, the court but soundly and discreetly exercised the general discretion alluded to.

The counsel for the plaintiffs in error, has also brought to our attention a point which seems not to have been so specifically taken in the motion for a new trial in the court below, as is suggested by all just conceptions of correct practice, and which, therefore, if it were not so easy to *modify* the decree in the respect complained of, we might be disin-

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clined to entertain at all. It is, that as one of the heirs died during minority, one-eighth part of whose share went properly to the mother, (Mrs. Gist, the principal defendant,) the decree against her should have been for a sum less, by that amount, than it was. Yielding this, and the decree of the chancellor in respect to the further investment of the remaining proceeds of the Kentucky land, would be for the sum of six hundred and forty-five dollars seventy-one and a half cents, instead of six hundred and seventy-three dollars and eighty-four cents.

It is therefore directed that the decree be modified accordingly, and that in all other respects it stand in full force, and that the plaintiffs recover their costs in both courts.

REIGN OF

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SUPREME COURT.

OCTOBER TERM, 1850.

GEORGE TAYLOR vs. JOHN MAGUIRE.

Defendant covenanted with plaintiff to build for him a boat hull and deliver it on a stated day. He failed to deliver it until two months after the time specified: plaintiff then received it, and afterwards instituted this action upon the covenant for the failure to deliver the boat at the time agreed upon. The measure of damage, in such case, is the *actual loss* sustained by the plaintiff on account of the failure by defendant to comply with the contract. The loss of the probable profits of the boat during the two months constitutes no part of the damages.

ERROR to St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

Covenant: Declaration filed August 12, 1847, summons returnable September term, 1847.

The obligation declared on was dated 8th Sept., 1846. In this contract it was agreed that Maguire should build the hull of a steamboat, certainly described, and finish it ready for the engines by the 1st February, 1847, for which certain payments were to be made, amounting in the whole to \$9000.

The boat was not then finished, but was never completed as agreed until the 12th day of April thereafter, the plaintiff being in no fault.

At the trial at the February term, 1849, the plaintiff offered evidence to show that by reason of the defendant's said breach of contract, the plaintiff had lost the use of the boat for the space of two months, and that the boat could have been chartered or hired to other persons for the period lost for the sum of more than \$5000.

Also that boats of inferior capacity and engaged in the same trade in which the plaintiff designed said boat to be employed, made to their owners a net profit of over \$14000, above all expenses.

The defendant objected to all this testimony, and it was excluded, to which the plaintiff excepted.

It was also agreed that at September term of C. C. P., 1847, a suit was brought by defendant against the plaintiff to recover a balance remaining due on the price of said hull.

That at the trial thereof, this plaintiff offered to recoup the damages, alleging the same damage by reason of the breach of contract on the part of Maguire, as that on which this suit is founded; and the court refused to allow him to recoup his damages, and so adjudged and decided, as appears by their record of judgment now standing therein.

That at the time of trial therein, and of the offer to recoup, the present suit was pending, having been entered at the same term with the other.

Taylor vs. Maguire.

That Taylor then claimed and offered to prove that the damages sustained as aforesaid, exceeded by several thousand dollars the amount then claimed by Maguire.

The case was hereupon submitted to the court sitting as a jury, who returned a verdict for the plaintiff for \$48.

The plaintiff then moved for a new trial, because

1st. The verdict was against the law and the evidence.

2nd. The exclusion of material and competent proof offered by the plaintiff.

3d. The verdict and judgment was less by several thousand dollars than it should have been,

And there is assignment of errors accordingly.

TODD & KRUM, for defendant in error.

1. The record of the suit of Maguire vs. Taylor, given in evidence, was a bar to a further prosecution of this suit. 17 Serg. & Rawle p. 322, and 11 Mo. R. 484, decide that a judgment between the same parties, upon the merits of a given claim, is a bar to any further prosecution of such claim between the same parties and privies, and although rendered during the pendency of the suit against which it is offered (Marsh vs. Pier, 4 Rawle, p. 273) and given under the general issue. 8 Mo. Rep. 120.

When recoupment has been relied on as a defence, the claim or demand upon which the recoupment is founded is finally adjudicated and terminated. 6 New Hamp. Rep. p. 481.

2nd. Besides, the law does not allow such damages as the plaintiff offered to prove. Maguire vs. Taylor, decided at the October term, 1848, of this court. Reported in pamphlet of 12 Mo. Rep. p. 313. 3 Humphrey Rep. p. 56; 21 Wend. Rep. p. 342.

RYLAND, Judge, delivered the opinion of the court.

From the above statement, it is plainly to be seen that the very point now presented for the consideration of this court, was heretofore before the court in the case of Taylor vs. Maguire, the same identical persons, parties thereto, as are now before this court. See 12 Mo. Rep. page 313. In the reported case, the presiding justice of this court, Judge Napton, wrote the opinion of the court.

Since this decision, this court has undergone a change in its members. I was not a member of the former supreme court; I have, therefore, from respect to the able counsel who again has brought this case before this court, looked into the facts of the case, as well as to the opinion given therein, as reported in 12 vol. Mo. Rep.

I concur very cheerfully with the opinion and views of Judge Napton, and feel no disposition to disturb or even cast a shade of doubt over his opinion.

Although Maguire was plaintiff in that case, and Taylor is plaintiff in this, yet the same subject matter was in controversy in both cases, and the same point in both cases in this court.

For the opinion of this court, therefore, in the present case, we refer to the case of Taylor vs. Maguire, 12 Mo. Rep. 313.

Judgment of the court below is affirmed.

Swearingen & Coriell vs. Steamboat Lynx.

SWEARINGEN & COUILL vs. STEAMBOAT LYNX.

The Mississippi river, from the northern to the southern boundary of the State of Missouri is one of the waters of the State referred to in the statute concerning boats and vessels.

ERROR to St. Louis circuit court.

STATEMENT OF THE CASE.

This was a demand under the statute. The plaintiffs alleged that they were owners of the steamboat Ohio, and that on the fifth day of April, 1845, as the Steamboat Ohio was ascending the Mississippi river, and had got nearly opposite Grafton, a town in Illinois, on said river, the steamboat Lynx was through the carelessness, remissness and negligence of her officers and crew, propelled against the steamboat Ohio, which last mentioned boat was thereby damaged to the amount of three hundred and twenty-five dollars.

The general issue was pleaded. At the trial the plaintiff's after proving their ownership of the steamboat Ohio, offered and gave evidence tending to prove that the collision had occasioned damages to the amount of two hundred and fifty dollars to the steamboat Ohio, and that the collision was produced by the bad conduct of the officers and crew of the Lynx, the officers and crew of the steamboat Ohio being free from blame. The defendants offered evidence tending to prove that the collision was attributable to the bad conduct of the officers and crew of the steamboat Ohio, and that the officers and crew of the Lynx were free from blame.

The defendant asked and the court gave the following instructions.

1st. The plaintiffs cannot recover in this action, without proving to the satisfaction of the jury that the injury complained of was done in the State of Missouri.

2d. Unless the jury find from the testimony that the steamboat Lynx at the time of the injury complained of, was a boat used in the navigation of the waters of this State, they ought to find their verdict for the defendant.

3d. The jury ought to find a verdict for the defendant, unless they find from the evidence that the collision between the two boats was occasioned by the negligence or misconduct of the persons in charge of the Lynx, and not to the negligence or misconduct of the persons in charge of the Ohio.

To the giving of which instructions the plaintiffs excepted at the time.

The court of its own motion gave the following instruction, viz:

The river Mississippi from the northern boundary of the State of Missouri to the southern boundary of the State of Missouri, and to the middle of the main channel thereof is one of the waters of this State, within the act concerning boats and vessels.

To the giving of which the plaintiffs at the time excepted. The plaintiffs asked the following instruction, to wit:

The river Mississippi from the northern boundary of the State of Missouri to the southern boundary of the State of Missouri is one of the waters of the State referred to in the act concerning boats and vessels;

Which the court refused, and plaintiffs excepted. The verdict was for defendant. The plaintiffs moved for a new trial, assigning for cause the error of the court in giving and refusing instructions, and the court overruling the motion, they excepted and filed their bill of exceptions.

GANTT, for plaintiff in error.

1. The State of Missouri has concurrent jurisdiction with all conterminous sovereignties

Swearingen & Coriel vs. Steamboat Lynx.

overall rivers bordering on the State so far as such rivers form a common boundary to the State of Missouri and any other State. Art. X of State Constitution, sec. 2.

2. The river Mississippi is one of the waters of this State from bank to bank, so far as it is a boundary between the State of Missouri and other States of the Union. *Ib. Ibid.*

3. The extreme inconvenience of the rule indicated in the instructions of the court and the difficulty of ascertaining either by night or day whether a collision occurred to the west or east of a perpetually shifting line, would of themselves be conclusive against the adoption of the rule. It is a rule of law that no statute shall be so construed as to produce absurd or inconvenient consequences. 1 Thomas Coke, page 19 and following; Devains on statutes 756 (side paging) 70 top paging, vol. 7 of the Law Library.

GAMBLE & BATES, for defendant.

1. The proceeding against a steamboat under our statute can only be maintained for a cause of action arising within this State. *Noble vs. steamer St. Anthony*, 12 Mo. Rep., 262; *S. B. Raritan vs. Pollard*, 10 Mo. Rep., 583.

2. The State of Missouri has jurisdiction, and the laws of the State have their operation only to the middle of the main channel of the Mississippi river. Missouri Constitution 1 article.

NAPTON, J., delivered the opinion of the court.

The collision which occasioned this suit took place in a portion of the Mississippi river forming the boundary between this State and Illinois, and the question of fact submitted to the jury was whether it occurred upon the east or west side of the line which constitutes the middle of the main channel of that river, the court declaring the law to be against any jurisdiction over the case, if it happened on the east of said channel. The constitution of this State has fixed the middle of the main channel of the Mississippi river as our eastern boundary; but the 10th article declares "This State shall have concurrent jurisdiction on the river Mississippi, and on every other river bording on the said State, so far as the said river shall form a common boundary to the said State, and any other State or States now or hereafter to be formed and bounded by the same." This provision is also found in the act of congress of March 6, 1820, authorizing a convention for a State Constitution.

The question to be decided is not one of conflicting jurisdiction with a sister State. It concerns only the proper construction of an act of this State, which is restricted to vessels "used in navigating the waters of this State." The question is whether a boat navigating the waters of the Mississippi where that river runs between us and Illinois, is navigating the waters of this State, within the meaning of this act.

We have heretofore said, that the act had no extra territorial operation, but even independent of the constitutional provision above refer-

Bircher vs. Watkins.

red to, we should not incline to follow the shifting channel of the Mississippi for the purpose of conforming to the exact line of territorial dominion. The legislature might have embraced the whole State of Illinois within the operation of the act, or the whole world and the rights or territorial jurisdiction of no one would have been affected.

The construction given by the circuit court would produce great and unnecessary inconveniences, and if adopted in Illinois as well as here, would have the effect of establishing on our border a sort of neutral territory where contracts could not be enforced, and wrongs must go unredressed.

Judgment reversed and cause remanded.

RUDOLPH BIRCHER vs. BENJAMIN F. WATKINS.

Plaintiff sued defendant on a covenant of seizin of indefeasible estate in fee simple; the only breach assigned was that defendant was not seized of an indefeasible estate in fee simple; defendant pleaded that at the time of making the deed he was seized of an indefeasible estate in fee simple. Upon the trial neither party gave any testimony. Held that the burden of proof devolved upon the defendant, but that the plaintiff could only recover nominal damage; that to entitle him to recover the purchase money with interest he must show that the defendant was not seized of an indefeasible estate.

APPEAL from St. Louis Circuit Court.

STATEMENT OF THE CASE.

Watkins sued Bircher on a covenant of seizin of an *indefeasible estate in fee simple* of a tract of land in Illinois. The covenant is contained in a deed of conveyance of said land. The deed bears date February 14, 1842, and states a consideration of \$600, on 17th February, 1840, and the covenant unlike most covenants of seizin is not in the present tense, but the past—that Bircher was seized, &c., on the 17th of February, 1840.

The only breach assigned is that Bircher was not seized, &c., of an indefeasible estate in fee simple on the said 17th of February, 1840, nor at any time thereafter.

Bircher pleaded that at the time of making the deed he was seized of an indefeasible estate in fee simple, &c., and issue was joined.

At the spring term, 1847, the case was tried before a jury, and there was a verdict for the defendant Bircher. The plaintiff Watkins moved for a new trial, and the defendant Bircher moved for judgment on the verdict. The court granted a new trial and overruled the motion for judgment. The defendant excepted and saved the whole case by bill of exceptions.

Afterwards, on 12th February, 1849, (being November term, 1848,) the case was again tried before a jury. Neither party gave any testimony.

On motion of the plaintiff, the court instructed the jury—1st. That the burthen of proof in

Bircher vs. Watkins.

this cause is on the defendant, and the said defendant having declined to offer any proof in support of his plea, the jury will find the issue for the plaintiff." 2d. "That the measure of damage is \$600 with interest from the 17th day of February, 1842, up to this date."

The defendant moved the court to instruct the jury that—"if the jury find for the plaintiff they ought to assess only nominal damages against the defendant," which the court refused to do.

Under the instructions given for the plaintiff the jury found the issue for the plaintiff, and assessed damages \$851 50, and judgment was rendered accordingly.

The defendant moved for a new trial, and in arrest of judgment, and both motions were overruled. All the points were saved by bill of exceptions, and the cause brought here by appeal.

GAMBLE & BATES, for appellant.

At the last trial the court erred.

1. In instructing the jury at the instance of the plaintiff, that the burden of proof lay upon the defendant, generally.

The defendant had pleaded seizin in himself, and it is admitted that the burden lay on him to that extent; but he was not bound to prove any thing as to amount of damages, and the plaintiff gave no testimony on that subject, not even the deed sued on.

2. In instructing the jury that the measure of damage was \$600 with interest from 17th of February, 1842, up to the day of trial.

3. The court erred in refusing to instruct the jury, at the instance of the defendant, that if the jury find for the plaintiff, they ought to assess only nominal damages against the defendant.

This point is clearly settled by this court in Collier vs. Gamble, 10 Mo. Reports, 472.

4. The court erred in overruling the defendant's motion, in arrest of judgment. The motion ought to have been sustained, because,

1. The issue was immaterial.

2. The issue was not in fact found by the jury—see the record.

3. On the breach assigned, only nominal damages could be recovered; 10 Mo. Rep. 472.

4. The declaration is insufficient: If the plaintiff went for all the consideration, money and interest, he ought to have alleged how much it was, and when paid; and he ought to have stated in his breach a total failure of seisin. If he went for a partial failure, he ought to have set forth the facts truly, as in case of a covenant against incumbrances.

5. At the first trial.

The circuit court erred in granting the plaintiff a new trial, and overruling the defendant's motion for judgment on the verdict rendered in his favor.

Under the fifth head we say that the circuit court erred,

1. In admitting illegal testimony for the plaintiff.

2. In instructing the jury erroneously in favor of the plaintiff.

3. In refusing proper instructions moved by defendant.

4. In overruling the defendant's motion for judgment on the verdict.

5. In granting the plaintiff a new trial.

CROCKETT, for Appellee.

1. That the plaintiff in error can assign for error nothing that was done by the court on the first trial. The granting of the new trial cannot be assigned for error—and especially as the appellant did not abandon the case at that point, but appeared at the second trial, and asked instructions to the jury.

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2d. That the defendant in the court below held the affirmative of the issue, and as he declined to offer any proof to the jury, the court properly instructed the jury to find the issue for the plaintiff.

3d. That the court properly instructed the jury that the measure of damages was the purchase money and interest. See *Collier vs. Gamble*, 10 Mo. Rep. 467.

4th. The court properly overruled the motion in arrest of judgment. The declaration is good, and the issue was not immaterial. The deed was dated 14th Feb'y, 1842, and the covenant was that the defendant on 17th February, 1840, was seized, &c. The breach assigned is, that the defendant, on the 17th February, 1840, or at any other time, was not seized, &c.; the plea is that he was seized, &c., at the making of the deed. The replication is that he was not seized at the making of the deed, or any other time.

5. But if the issue was immaterial, a repleader is never awarded where the court can give judgment upon the whole record, nor at the instance of the party who committed the first fault in pleading. 2 Tidd's practice 952, 953; 1 Ld. Raymond 170; Doug. 396, 747; 2 Saund. 319, 320. The fault, if any, was in the defendant's plea, and therefore he cannot demand a repleader.

6. The court will not reverse the case, set aside the verdict and award a new trial, if upon the whole record the judgment is right and as it ought to be. The defendant, in his bill of exceptions, has preserved the proof upon the first trial. It is apparent from the proof that defendant below had no title to the land at the date of his deed on the 17th Feb., 1840.

NAPTON, J., delivered the opinion of the court.

The only point, about which there can be any difficulty in this case, is the one concerning the measure of damages. The state of the pleadings was such as to dispense with the necessity producing the deed, and the burthen of maintaining his plea was certainly upon the defendant.

In declaring upon covenants, it is generally sufficient for the pleader to negative the words of the covenant, a breach of which is alleged. This rule applies to a covenant of seisin, and of good right and title to convey. It does not apply to covenants against incumbrances. The covenant, that the grantor is "seised of an indefeasible estate in fee simple," as we have had occasion to remark in previous cases, is a compound one. It embraces the simple covenant of seisin, and also a covenant against incumbrances. If the pleader desires to charge a breach of the simple covenant of seisin, he should adopt language appropriate for that purpose. If he chooses to negative the words of the compound covenant, as has been done in this case, he subjects himself to the embarrassment which has occurred here. The defendant in reply asserts that he is seised of an indefeasible estate in fee simple, but fails to give any proof. What then is the measure of damages? The breach is admitted. It is conceded that there was not an indefeasible estate in fee simple in the grantor, and this may happen from two causes, either because the grantor had no seisin at all, or because his

Gould, to the use of Crockett & Briggs, vs. Citizens Insurance Company.

estate was defeasible by reason of a paramount title or an incumbrance which might defeat the title partially or entirely. In the former event the damages would be the purchase money and interest, and in the latter, the plaintiff would only be entitled to nominal damages, until actual damages had been sustained. This rule seems to be a reasonable one and has been recognised in *Collier vs. Gamble*, (10 Mo. R. 472.) The question here is, to which rule shall we subject the defendant, where no proof is offered to sustain his plea. Shall we assume, that because he admits that he was not seized of an indefeasible estate, he was therefore not seized of any estate at all? It is said that if we do not draw this inference, we shift the burden of proof from the defendant to the plaintiff—and this is true so far as incumbrances are concerned, and such has always been the law.

We require the plaintiff to aver and prove an incumbrance, if that is the breach relied on. But we do not require the plaintiff to aver anything more in relation to the covenant of seisin, than a breach of it, and the burthen must be upon the defendant to show his seisin. In this case he has averred a breach of both covenants or of the compound covenant, without specifying any particular incumbrance or other paramount title. The course of the pleadings, and the conduct of the defendant on the trial, has placed the plaintiff precisely where he ought to have placed himself at the start. He was only entitled to nominal damages, since the court could not look behind the pleadings and conjecture what occasioned the breach of the covenant, the want of seisin or the existence of an incumbrance.

Judgment reversed and cause remanded.

A. B. GOULD TO THE USE OF CROCKETT & BRIGGS vs. CITIZENS' INSURANCE COMPANY.

If the owner of property insured, upon being notified of its loss, abandons it and notifies the underwriters of the abandonment, from the time of the abandonment the underwriters become the owners of the property, whether they accept the abandonment or not, provided the loss happens from one of the perils insured against.

CROCKETT, for appellant.

First ruling by the court, which was objected to, was as follows:

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Gould, to the use of Crockett & Briggs, vs. Citizens Insurance Company.

was saved, the plaintiff cannot recover." This statement of the law was erroneous. The effect of an abandonment, if justified by the facts and by the terms of the policy, was to vest the property in the office by retro-action, from the time of the loss. *Coolidge vs. Glo. Mas. Ins. Co.*, 15 Mass, 346; 2 Phill. Ins. p. 418; *Schafflin vs. N. Y. Ins. Co.* 9 Johns. 25.

And that whether the abandonment was accepted or not; 2 Phil. Ins. 400.

It is settled in the United States that "an abandonment once rightfully made, is conclusive and the rights following from it are not divested by any subsequent events, which change the situation of the property." By Story Justice. *Peele vs. Mason. Rheinlander vs. Ins. Co. Penn.* 4 Cranch 29.

"The master in consequence of his abandonment, becomes the agent of the *insurers*, and the *plaintiffs* are not bound by his subsequent acts, unless they have adopted them." The acceptance of the abandonment has nothing to do with the rights of parties acting in good faith, if the abandonment itself, is justifiable. This is clearly settled in the case of *Jumel & Deserby vs. The Marine Ins. Co.*; also *Chesapeake Ins. Co. vs. Stark*—7 Johns. 422; 6 Cranch 268; *Dickey vs. Am. Ins. Co.* 3 Wend 664.

If the abandonment is made while the loss continues total in the eye of the law, "*all the intermediate acts of the master are the acts of the underwriters.*"

And if the abandonment is rightly made, the office is thereby subrogated to the property and liability of the insured. The abandonment is like a deed of sale, and vests the property, with also its contingent profits and losses, and the conduct of the captain, in the underwriters *Dederer vs. Del. Ins. Co.*, 2 Wash. C. C. Rep. 61. *Bryant vs. Com. Ins. Co.*, 6 Pick. 311.

The question of ownership of the property insured is one partly of law, and partly of fact. The first instruction withholds from the jury the legal information and quality, which would settle the question whether King & Fisher or the office were owners.

It should have been added: If by reason of a peril insured against, there was an actual total loss of the thing insured, or a constructive total loss by reason of the loss of more than 50 per cent. of its value; then, if the insured abandoned during the continuance of such loss, seasonably after notice thereof, the defendants became thereby owners, by relation back from the time of the loss. 2 Phil. 418.

GEYER & DAYTON, for appellees.

Defendants instruction no. 1, we contend was properly given. The undertaking in the policy to contribute to the charges of saving the property in case of an accident, was the assured, and does not, we submit, render the underwriters as such responsible to any other person, nor to the assured themselves except directly on the policy. 1 Phillips Insurance, 330.

The plaintiff's instruction was properly refused. It asserted that the abandonment and notice (if the loss happened by a peril insured against) made the defendants the owners of the property insured, whether they accepted the abandonment or not. It will be perceived that this instruction disposed of any question as to the extent of the loss. The jury were not required to consider whether the loss was sufficient to justify an abandonment or not. Nor were they to consider whether the abandonment, if proper at first was not afterwards waived. The instruction also excludes all questions as to whether the boat was properly equipped, loaded, provided, or managed. The only fact to be found, in order to sustain the validity of the abandonment was that the loss happened by a peril insured against.

We therefore, maintain that the instruction does not present the question of the effect of a valid abandonment in transferring property in a case entirely proper for an abandonment.

But underwriters cannot by an abandonment (refused to be accepted) even in a case proper for an abandonment be made owners of the abandoned property, certainly not so as to make them liable for services rendered in relation to such property. Salvors might have a lien upon property saved, but they would have no claim against the underwriters independent of the property. The underwriters may refuse to accept the salvage and pay the charges. They have the right to pay the

Gould, to the use of Crockett & Briggs, vs. Citizens Insurance Company.

assured his loss and have nothing to do with the property. 1 Philips on Insurance, 466; 2 do. 390; 1 Summers Reports 400.

But owners cannot be made responsible for services rendered to their property without their directions or subsequent approval.

Judge BIRCH delivered the opinion of the court.

The defendants were underwrites on a charge of pork shipped on board the steamer *Defiance*, and lost by a peril insured against, by reason of the boat being wrecked, and sunk in the Mississippi. Immediately after the wreck, the master, by a contract in writing, signed by him as "agent for owners and underwriters," and professing to be "for the benefit of whom it may concern," agreed with the plaintiff who was the owner of a bell-boat near by, to save what he could from the wreck, after and for the rate of a certain per cent. as salvage, the master reserving to himself the right to save, first, what he could; under which he did save a portion of the cargo, and notified the office accordingly.

Under this arrangement, the plaintiff saved a considerable amount of property, for which, and for his labor, expenses and services, he claims compensation of the company, the defendants. An abandonment, with notice, was duly made by King & Fisher, the insured, but not accepted by the defendants. They afterwards, however, settled the claim of King & Fisher, by an arrangement which gave them the avails of the property saved, besides paying *them* the amount claimed by *them* for loss and damages.

The policy contains the usual clauses, giving the right to the insured and their agents, to labor, expend, travel, &c., in and about the recovery of the property insured, at the expense of the office, &c.

It is deemed unnecessary to recapitulate the testimony, inasmuch as the instructions which were given, as well as the one refused, were hypothetical, and would consequently leave the finding of the facts to the jury. Those given at the instance of the defendants were:

1. If the property saved from the wreck of the *Defiance* was the property of King & Fisher, at the time it was saved, the plaintiff is not entitled to recover in this action.

2. Unless the steamboat *Defiance* was a good boat, for the navigation of the river below St. Louis, within the meaning of the policy, the plaintiffs are not entitled to recover.

It may be conceded that these instructions *condense* the law of the case, and that if given to a jury of *lawyers* might have been sufficient. The first one, however, is deemed to have fallen short of the duty of

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the court, in not directing the jury, as prayed for in the instruction which was asked by the plaintiff, upon what *grounds* they should proceed, *for the purposes of this suit*, in finding the question of property, whether (literally, as originally) in King & Fisher, or (*constructively*, by operation of law,) in the underwriters.

It need scarcely be repeated here, the fact being seemingly conceded that, in cases of this nature, the master of the vessel becomes the agent of the underwriters, and that his agreement with the plaintiff, as a wrecker of the boat, was consequently valid, and binding upon the office, (if it was liable at all) unless it was clearly unreasonable or legally disaffirmed or avoided. Applied, therefore, to the technical total loss which the record establishes in reference to the cargo in question, the last instruction unquestionably embodies the true law, and ought not, consequently, to have been refused by the court, particularly as it was in testimony that the defendants were fully apprised of the plaintiff's claim, when they made the subsequent arrangement and settlement spoken of with King & Fisher, the insured, that instruction was in these words:

"If the defendants were underwriters on the 700 barrels of pork, shipped by King & Fisher on the *Defiance*, and if King & Fisher upon being notified of the loss abandoned to the defendant and immediately gave notice of such abandonment, then, from the time of such abandonment, the defendants were, in contemplation of law, the owners of said property, whether they accepted the abandonment or not, provided the loss happened from one of the perils insured against."

Inasmuch, therefore, as it is apparent from a view of the whole case, that it ought to have been tried under this instruction, in connexion with the first ones, it is reversed and remanded accordingly.

JACOB PECARE WHO SUES TO USE OF MORRISON & LEVY vs. PIERRE CHOUTEAU,
SEN'S ADMINISTRATOR.

The covenant of seisin in a deed is an assurance to the purchaser that the grantor hath the *very estate*, both in *quantity* and quality, which he purports to convey. The covenant in such case is broken if the grantor does not own *all* the land covered by his deed.

STATEMENT OF THE CASE.

This action was brought on a covenant of seisin in a deed, and the breach assigned was, that defendant was not seized of all the land he professed to convey. Plea under statute of 1847.

Pecare, use of Morrison & Levy, vs. Chouteau's administrator.

The record in this case shows the following state of facts. On the 20th May, 1844, Pierre Chouteau, Sen'r, conveyed to plaintiff with covenants of seizin a tract of land, which in his deed he described as follows: "All that certain tract of land situate in the place commonly called Marias Cortoi in the county of St. Louis containing 57 arpents French superficial measure, bounded westwardly by land of one O'Niel, eastwardly by land of said Pierre Chouteau, northwardly by land of the late William Clark, and southwardly by land of the late Auguste Chouteau."

On the trial of this case plaintiff read in evidence a deed from Chouteau to Clark, a deed from Clark to Goodfellow, and a deed from Pierre Chouteau to plaintiff that contained the covenant sued on. The plaintiff then proved by William H. Cozzens, a practical surveyor, that at the time Chouteau made his deed to plaintiff, calling for 57 arpents, equal to 48 49.100 acres he had not so much land left in his tract, that the deed to Clark read in evidence covered 14 47.100 acres off of the eastern end of said tract and that prior to the conveyance to Clark there was sufficient land left on the eastern end of Chouteau's tract to satisfy the call for quantity in Chouteau's deed to plaintiff. This witness also proved that a larger or smaller quantity of land might be contained in the boundaries called for, provided Chouteau had still owned to the eastern end of his tract. That the boundaries called for in Chouteau's deed to plaintiff were as well satisfied by excluding as including the 14 47.100 acres. Upon this testimony the court instructed the jury that the plaintiff could not recover. Whereupon the plaintiff became non-suit, with leave to move to set the same aside, which motion having been overruled the plaintiffs comes here by appeal.

LORD, for appellant.

I. The breach assigned in the declaration was fully sustained by the proof, and the court below erred in instructing the jury that the plaintiff could not recover.

The covenant of seizin is broken if the vendor does not own all the land covered by his deed. This position is fully sustained by the following authorities: *Leland vs. Stone*, 10 Mass. R. 459; *Barus vs. Learned*, 5 N. H. R. 264; *Wilson vs. Forbes*, 2 Dev. N. C. 30; *Sedgwick vs. Hollenbeck*, 7 Johnson, 376; *Mann & Toles vs. Pearson*, 2 Johnson 36.

The covenant of seizin is an assurance to the purchaser, that the grantor hath the very estate both in quantity and quality which he purports to convey. *Platte on Covenants*, 306; *Hilliards*, abridgment of the law of real estate, vol. 2, 377; *Opinion of Lord Ellenborough in Hovell vs. Richards*, 11 East, 642

DARBY & FIELD, for appellees.

The only question in this case is whether the call for quantity in the testator's deed is a covenant that the land conveyed contained that quantity. We insist on the negative, and rely on the case of *Ferguson vs. Dent*, 8 Mo. R.

NAPTON, J., delivered the opinion of the court.

We do not consider this case as coming within the principle decided in *Ferguson vs. Dent*, (8 Mo. R. 667,) and *Dryden vs. Holmes*, (9 Mo. R. 135.) The covenant of seizin is an assurance to the purchaser that the grantor hath the very estate, both in quantity and quality, which he purports to convey. The enumeration of quantity is not usually of the essence of the contract, but merely matter of description. Yet a deed may be so framed as to make the enumeration of the acres granted of the essence of the deed; as where the boundaries can only be fixed by

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the quantity. Here, it will be observed, that Chouteau conveys a tract of 57 arpents, bounded on three sides by the lands of others, and on the fourth by himself. How is it possible to ascertain the metes and bounds of this tract, except by applying the quantity mentioned to ascertain the fourth line? I do not perceive any other sensible construction of the grant, for as has been well observed by the counsel, a strip no wider than an ell or a peppercorn, would satisfy the description, if we can reject quantity. I look upon the quantity of 57 arpents as a part of the metes and bounds, as though the deed had described the three lines on the west, north and south, and then for the east line had fixed a point in the north or south line at such a distance as would give the quantity of fifty-seven arpents. Suppose the deed had so read, is it not clear that the previous conveyance to Clark of 14 47.00 acres on the east end would have been a breach of the covenant of seisin?

The cases in which quantity has been held mere matter of description, it will be observed, are cases where the specific tract conveyed was fixed by metes and bounds or by numbers, or in some other way so determined as to place beyond doubt what tract was conveyed. Here the case is totally different. The grantor owns or supposes himself to own a large tract of land, and proposes to convey a part of it from one end. He conveys fifty-seven arpents from the west end of this tract, without determining the eastern line in any other way than by specifying the quantity. If the covenant of seisin is good for any thing at all, in such a deed, it must cover the deficiency of quantity. It has never been doubted, that where a specific tract is conveyed, and a portion of the land is lost to the vendee, he can recover on his covenants. All the cases cited in support of the decision in the court of common pleas, are cases where the purchaser has got all the land *purported to be conveyed*, and he desires to go further and make the covenants extend to mere matters of description, as that a brick house was on the land, or it contained a certain number of acres. These cases are not at all analogous to the present.

Judgment reversed and cause remanded.

ISAAC S. SMYTH vs. JOSIAH SPALDING.

If an agent makes a bill of exchange in his own name, or makes a contract in such shape as to bind himself on the face of the instrument, and not by his signature to bind his principal, he is individually bound, although his agency was known by the other party at the time of making it.

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ERROR to St. Louis Court of Common Pleas.

KELLOGG, for plaintiff in error.

It is a general rule of law, that as between the immediate or original parties to a bill of exchange, the total or partial want or failure of consideration, or the illegality of consideration may be insisted upon as a defence or bar to an action.

It may be set up by the drawer against the payee, by the payee against his indorser, and by the acceptor against the drawer. Story on Bills, 2 edition, p. 217, ch. 6, sect. 187.

As between these parties it is a good defence, that the bill is a mere accommodation bill. *Ib.* p. 217 and note.

The law presumes, for the protection of commercial paper, a valuable consideration as between third parties to a bill or note taken in the regular course of business, *bona fide*—without notice—but between the original parties to the bill, this presumption may be rebutted. *Ibid.* p. 212, sect. 184.

The court below erred in refusing to permit the defendant to offer evidence in regard to the consideration of said bill, to explain the circumstances and manner in which said bill was drawn by him; that it was an accommodation bill, and no credit was given by the payees to the drawer, Smith. Although evidence offered may not of itself be sufficient to establish a defence, it should be admitted, if it establish a link in the chain of evidence. The weight of such evidence must be left to the jury, and cannot be decided by the court. *Lane vs. Kingsberry*, 11 Mo R. 402.

As between the original parties, the drawer and payees in this case, it was competent for the drawer, Smyth, to show that he acted merely as clerk or agent for the acceptors, Johnson, Dryer & Trowbridge; that this was known at the time said bill was drawn and delivered to the payees, or that it was a general understanding that he was merely an agent, and not to be held responsible; and said Smyth is not bound to shew a special agreement to exonerate him, although the word agent was omitted by mistake on the bill. *Miles vs. O'Hara*, 1 S. & Rawle, 32, a case exactly in point.

The circumstances under which a bill is drawn, go to the consideration, which is a fact to be decided by the jury.

SPALDING, for defendant.

1. An agent, known to be such, if he makes the contract in such shape as to bind himself on the face of the instrument, and not by his signature to bind his principal, is bound individually. Story on Agency, section 269, 270, 271, 272, 273, 278, as to the general doctrines on the subject. Also same books, sections 155 156, 157; also sections 151, 152, 153, 154; 5 Taunton, 749, *Lefevre vs. Loyd*, agent bound as drawer of Bill; 7 Tairn to same effect; 6 Adolph & Ellis, 486, *Jones vs. Littledale*. In this case, agents made sale of goods, and known to be agents and to sell as such. They made out the invoice in *their own names*. The goods not being delivered, suit was brought against them and judgment recovered. The court say, "There is no doubt that evidence is admissible on behalf of one of the contracting parties, that the other was agent only, though contracting in his own name, and so to fix the principal; but it is clear that if the agent contracts in such a form as to make himself personally liable he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself from that responsibility."

7 Mass. 518, *Hunt vs. Adams*. A note was made, and payee agreed with maker at time she should not be called on, &c; Held that this evidence was inadmissible.

11 Mass. 54, *Mayhew vs. Prince*. Where agent drew bill on house of which his principal

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was partner, and in bill ordered contents to be placed to credit of his principal, he was holden personally liable. The court says, that "It is a general principle that the signer of a contract, if he intends to prevent resort to him personally, should express in the contract the quality or capacity in which he acts." And that defendant choose to exercise his agency in such manner as to make himself individually responsible.

Cowan & Hill's notes, part 2d, p. 1460-1. That when a note has been made and delivered, it is not permitted to look for its terms out of it. They can be proved only by the instrument itself. It cannot be shown that by a cotemporaneous agreement, that the principle should not be called for so long as interest was paid; or that a different time was fixed for payment, or a different sum; nor that a time was agreed on, when no time for payment was specified in the note.

Ibid, p. 1467, that prior and cotemporaneous parol negotiations and agreements are merged in the written contract, &c., giving the reasons.

RYLAND, Judge, delivered the opinion of the court.

This was an action of assumpsit brought by Spalding, the defendant in error in the St. Louis court of common pleas, against Isaac S. Smyth, on a bill of exchange drawn by said Smyth on Johnstone, Dryer & Trowbridge, for six hundred and sixty-three dollars and fifty cents, payable four months after date, to Whittemore & Cutter or order, which was endorsed by said Whittemore & Cutter to Josiah Spalding, (the plaintiff) or order. The bill of exchange was accepted by said Johnstone, Dryer & Trowbridge, but was afterwards protested for non-payment.

On the trial below, the defendant having plead the general issue, it was admitted that when the said bill of exchange which was given in evidence by the plaintiff below, was so given in evidence, the defendant below admitted due notice of the dishonor of said bill of exchange for non-payment; also admitted due acceptance by the drawees as well as presentment and protest for non-payment; also admitted the endorsement of said Whittemore and Cutter on said draft to the plaintiff.

The plaintiff then admitted that he was only acting in the suit for Whittemore and Cutter, and agreed that the defendant might set up any legal defence in this suit, as if the same was in the name of Whittemore & Cutter as plaintiffs.

Thereupon the defendant offered to prove, that the defendant at the time of the drawing of said bill of exchange was the clerk or agent of Johnstone, Dryer & Trowbridge, and was in no way interested in the goods purchased for said Johnstone, Dryer & Trowbridge, and for the payment of which said bill of exchange was given, and that Whittemore & Cutter, the payees in said draft, knew at the time of said agency, and gave credits to said Jonstone, Dryer and Trowbridge, and not to said de-

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fendant, and that the goods purchased were charged on said Whittemore & Cutter's books to Johnstone, Dryer & Trowbridge, and the account was balanced by said draft—which proof the court of common pleas rejected—the defendant excepted.

The jury found a verdict for the plaintiff; motion made by defendant below to set aside the verdict and grant him a new trial—overruled—excepted to—and the defendant below brings the case before this court by writ of error.

The only question before us is as to the propriety of the court's exclusion of the testimony on the part of the defendant.

The authorities cited by the counsel for the defendant in error, in our opinion, sustain and justify the action of the court below.

X It would be allowing the maker of a written, plain and unambiguous contract materially to change and alter it by parol evidence. The drawer of this bill of exchange has made himself personally and individually liable by the manner of drawing and signing it, and we hold it better for the interests of commerce, and more compatible with the principles of the law regulating evidence to sustain and enforce his liability, than to suffer any parol proof to be given tending to explain it away or destroy it. He might have subscribed his name as agent or clerk at first; but he thought otherwise, and acted as an individual on his own responsibility. Let him therefore abide by it. We deem it not necessary again to cite the authorities. We refer to the argument of the counsel for defendant in error, and to the authorities cited to sustain his point. We are satisfied with the ruling of the court below; its judgment will be therefore affirmed.

JOHN BIDDLE vs. HENRY BOYCE.

A petition under the act to reform pleadings and practice, must substantially set forth facts which, under the rules and principles of law, would entitle the plaintiff to a judgment.

ERROR to St. Louis Circuit Court.

GANTT, for plaintiff in error.

The plaintiff had a right of action, either of assumpsit or trespass, under the old system. It matters not which of these forms of action be judged most appropriate. It is submitted that

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either of them could be sustained by the evidence, but if either one of them be so, the petition is good. If the *facts* stated in the petition be such as would support a petition, drawn so as to conform to the views entertained by the counsel for the defendant, then the petition demurred to is good, and the judgment of the court below is erroneous and should be reversed. Form of action is entirely out of the question. Every thing of that kind is entirely done away with by the recent practice act under which this suit was brought. It was unnecessary therefore, that it should appear from the petition whether the action should have been assumpsit or trespass under the old system. Yet this is precisely the objection taken by the demurrant.

RYLAND, Judge, delivered the opinion of the court.

This is a proceeding under the new law reforming the pleadings and practice in courts of justice in Missouri.

The plaintiff filed his petition in the circuit court of St. Louis county, as follows:

The plaintiff states that he is the owner and proprietor of a lot of ground in the city of St. Louis and State of Missouri, described as lot number six (6) in block one hundred and forty-five, situated on the west side of Sixth street, between Carr street and Biddle street, having thirty-two feet seven inches in front, by one hundred and twenty-five feet in depth, to an alley twenty feet wide, on which lot of ground is a wooden building.

That said lot of ground and premises were until the fifth day of September, eighteen hundred and forty-eight, in the possession of a certain Dennis Delany, to whom they had been demised by a lease, then expiring, and that from the said 5th day of September, 1848, up to the 5th day of September, eighteen hundred and forty-nine said defendant has received and converted to his own use, the rents and profits of said premises monthly, amounting in all, as plaintiff is informed and believes, to the sum of two hundred and fifty dollars, which sum of money so received by said defendant, and of right belonging to said plaintiff, he the said defendant, refuses to pay over to said plaintiff, although so to do the said defendant was specially requested, on the 24th day of September, in the year eighteen hundred and forty-nine, at Saint Louis in the State of Missouri, wherefore plaintiff prays judgment for the sum of two hundred and forty dollars and interest, being the amount due him.

To this petition the defendant filed his demurrer, setting forth the following causes, viz:

- 1st. That it does not state that the lease to Delaney in said petition mentioned has expired and ended.
- 2nd. There appears on the face of the petition no relation or privity

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between the plaintiff and the defendant, from which the duty of the defendant to account for the rents and profits in said lease, reserved to plaintiff, can be deduced; on the contrary, it does not appear but that the said defendant holds the premises in question under and by virtue of a title adverse to plaintiff's title.

The demurrer was sustained, and judgment given thereon for defendant.

The plaintiff now brings the case before this court by writ of error.

The single point before us then is on the sufficiency of the petition.

The petition is required to contain "a statement of the facts constituting the cause of action or causes of action in ordinary and concise language without repetition, and in such manner as to enable a person of common understanding to know what is intended." If the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded.

The hand of innovation has done its work upon our former system of practice and pleading. But still we must think in the language of the law. We cannot forget what is meant by its terms.

The plaintiff's petition may be taken as true, and yet the facts set forth therein are not sufficient in our estimation to warrant a judgment for him.

We think the exceptions taken by the defendant are good and substantial, and fully justify the judgment below.

The plaintiff must shew that he has a good cause of action against the defendant, and he must shew it in such a way that the court can understand it, and see that under the rules and principles of the law his statement, if true, entitles him to judgment. The above statement made by the plaintiff, admitting it to be true, does not sufficiently shew us his cause of action.

The judgment is therefore affirmed.

WILLIAM S. McKNIGHT vs. WM. SPAIN, USE OF A. P. FIELD.

In a criminal cause, where judgment is for costs only, without specifying the amount, an execution upon it which commands the sheriff (or other proper officer) to make the costs in the cause, is good; provided the name of each of the officers and other persons to whom fees are due, together with the amount due each be properly endorsed upon it.

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2. By the 30th sec. of the 7th art. of the act concerning "practice and proceedings in criminal cases," the State has a lien upon the property of the defendant, in case of conviction, from the time of arrest or the indictment found, whichever should first happen, which cannot be divested by any subsequent assignment—not even to counsel to assits him in his defence. The arrest of the defendant by an officer without a warrant, is sufficient to attach the lien of the State.

APPEAL from St. Louis Circuit Court.

LESLIE, for appellant.

The property in question belonging to Spain at the time of arrest was by lien bound for the payment of the costs of the prosecution by Spain. And Spain being convicted, he levied upon the property and money to satisfy the execution according to the 30th section of the 8th article of practice and proceedings in criminal cases. K. S., 1845, page 887, sect. 30th.

FIELD, for appellee.

The appellee insists in this case that upon the whole record, the case was decided as it should have been, for the plaintiffs below:

1st. Because it was not shown by any proof offered in the case, that Spain was arrested on the charge of which he was indicted and convicted. If he had been legally arrested before the finding of the indictment, it should have been shown by the warrant, affidavit or in some other legal way. This not having been done, the presumption was that the indictment was the first step legally taken in the prosecution.

2d. Although he might have been arrested before the assignment to Field of the money in controversy, still the appellee contends that the State had no such lien on the money as would have prevented Spain from using it to employ counsel to defend him against the charge of grand larceny.

3d. Does this law which says that all a person's property both real and personal, shall be bound for the fine and costs in the case from the time of arrest or finding of the indictment whichever may happen first, embrace money which a man may have in his pockets—does personal property, when used in the law above referred to include money. I think it is evident that it does not. The terms personal property used in the criminal code does not mean money. See Revised Laws, State Edition, page 887, sect. 30.

Taking, therefore, all the provisions of the law together, Spain, undoubtedly, had a clear legal right to use the money he had to employ counsel to defend him against this charge, and in doing so he violated no right the State had. Revised Laws, page 872, sect. 4; do. page 887, sect. 30; do. page 415, sect. 40. Under the head of jail and jailors, see Revised Laws, page 617, sections 9 and 11.

RYLAND, Judge, delivered the opinion of the court.

This was originally an action of assumpsit brought before a justice of the peace in Saint Louis township by the appellee, William Spain for the use of A. P. Field against the defendant, William S. McKnight for the sum of ninety dollars for money and property levied upon by

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McKnight, by virtue of an execution from the criminal court, in favor of the State of Missouri against said William Spain. From the record and proceedings below, we find the following facts: Spain was arrested by James McDonough, Captain of the city watch, for grand larceny. McDonough found upon his person a one hundred dollar bank note of the bank of Missouri, and a gold watch. This watch and bank note, McDonough, at the time he arrested Spain, took from, and the same remained in the hands of the officers of the criminal court of St. Louis county, until after Spain was indicted and convicted of the crime of grand larceny, and adjudged to pay the costs of the prosecution. An execution was issued by the clerk of the criminal court in favor of the State against the goods and chattels of said Spain, and William S. McKnight the marshal of said criminal court, levied said execution on the above property, that is, the bank note and the gold watch, and returned on said execution, that he had made by the sale of the same the amount of one hundred and sixty-one dollars, being fifteen dollars and fifty cents less than the costs. It also appears, that Spain, shortly after his arrest, conveyed by bill of sale the above property, that is, the gold watch and hundred dollar bank bill to A. P. Field, Esq., in order to employ him, said Field, as an attorney to defend said Spain on his trial for said grand larceny. It appears that said A. P. Field did defend said Spain on the trial, but Spain was found guilty, the jury stating in their verdict that the "amount of money stolen was nine hundred and nine dollars and ninety-five cents." It appears that Captain McDonough had no warrant against Spain at the time he arrested him, nevertheless, he, a captain of the city watch arrested Spain on a charge of grand larceny, Spain was indicted on the charge, was convicted and sentenced to the penitentiary for five years. In order to make the costs of this prosecution, an execution issued and the property taken from Spain by McDonough was levied on by the marshal of the criminal court, the present appellant, and sold to make the costs. The sale of the property to Field was after the arrest and before the indictment.

The plaintiff, Spain to the use of Field obtained judgment for ninety dollars and costs against the appellant McKnight before the justice of the peace, McKnight appealed to the circuit court, there Spain again obtained judgment for \$90 against McKnight, and McKnight moved for a new trial, which was overruled. He excepted to the opinion of the circuit court and brings the case to this court by appeal.

On the trial of the cause in the circuit court, evidence was excluded on the part of McKnight, and instructions refused on his part which at the time were excepted to by the defendant. It seems that after the

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defendant had given a copy of the record and proceedings from the criminal court of the case of the State of Missouri vs. William Spain, indicted for grand larceny, in evidence, also a copy of the execution which had issued on the judgment of conviction and for costs in said case, so as to show the indictment, conviction, judgment, execution for costs, levy and sale return made by marshal McKnight, the plaintiff moved the court to rule out from the evidence, the execution, endorsement and return thereto, because the same was void, which motion the court sustained—declared the execution void, and ruled out the same, and the return and endorsement from before the jury as any evidence. To this judgment of the court the defendant excepted.

After the evidence was closed, the defendant prayed the court to give the jury the following instructions, viz :

1st. If the jury believe from the evidence, that the property in question was in the possession of William Spain at the time of his arrest, or at the time the indictment was found against him, the State has a lien upon the property, which could not be divested by any assignment made to the plaintiff in this suit.

If the jury believe, that the property in question was before the date of the assignment in possession of the officers of the State, then the State had a right to retain the said property to pay the costs and expenses of the suit and prosecution of the indictment against Spain which were adjudged against Spain, in favor of the State by the judgment of the criminal court of Saint Louis county. The court refused to give these instructions—and the defendant below excepted. The court then gave the following instruction for the plaintiff, (viz:) “If the jury believe from the evidence, that the money in question was assigned by Spain to A.P. Field, to whose use this suit was brought, and that the defendant had notice of the said assignment while the money was in his hands and before this suit was instituted, the plaintiff is entitled to recover in this action.” The defendant excepted to the giving this instruction.

The giving and refusing these several instructions and the excluding the evidence of the execution, endorsement and return are now before us for consideration.

In the first place, I will state that by our statute, practice and proceeding in criminal cases, article VII, sec. 30, “The property real and personal of any person charged with a criminal offence, shall be bound from the time of his arrest, or finding the indictment against him (which ever shall happen first,) for the payment of all fines and costs which he may be adjudged to pay.”

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The 31st sect. of the same article makes it the duty of the clerk at the end of each term to issue execution for the costs of convictions in criminal cases during the term and remaining unpaid, which shall be executed in the same manner as executions in civil cases.

The conviction of the defendant, William Spain, appears from the bill of exceptions to have taken place on the 29th of March, 1845, and the execution for the costs was dated the 4th day of June, 1846. The execution commands the marshal of the county of St. Louis to make the costs in the case of the State vs. Spain, without saying what sum these costs amount to on the face of the writ; but on the back of the writ of execution I find the costs endorsed. The officer is named, and the amount due him as costs, as follows, thus—

July term, 1845. The State vs. William Spain. Judgment for costs						
Clerk's fees	-	-	-	-	-	\$11 95
Marshall	-	-	-	-	-	10 12
Circuit Attorney	-	-	-	-	-	8 00
Jailor, Jamison	-	-	-	-	-	56 75
B. Garvin, witness,	-	-	-	-	-	78 00
Aug. Guilbreth, do.	-	-	-	-	-	3 00
Service,	-	-	-	-	-	1 00
Commission	-	-	-	-	-	5 25
Advertising	-	-	-	-	-	2 50
						<hr/>
						\$176 57

This is the manner of collecting the costs in civil cases. The judgments are, for the debt so much, and damages so much, and costs, without specifying what exact sum, and on the execution the costs are endorsed and this has ever been considered in this State sufficient authority to make the costs. I am not satisfied that the execution in this case offered in evidence by the defendant below was void. On the contrary, I think it proper evidence, and ought to have been permitted to remain with the jury. What makes the execution void? The clerk has authority to issue it expressly under the statute. He issues it and endorses the amount of costs due each officer and witness on the writ. The judgment is for costs, not specifying any particular sum. In civil cases the law of executions, Digest 1845, chapter 61, section 9, page 476, requires the clerk to endorse upon every execution the amount of debt and damages and costs before the delivery of the execution to be executed. If there be no debt nor damages, but a judgment for costs only, then I conceive an execution without any specific sum mentioned on its face for costs, will be sufficient, if the clerk endorse the amount of costs on it before he gives it to the officer to be executed. The

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court then erred in its judgment in ruling out the evidence of the execution, its endorsement and return.

The plaintiff contends that the section of the statute which gives to the State a lien on the defendant's property, real and personal for the costs, fines, &c., must be so construed as to be a lien on a part or portion only of his property, enough must be left him to employ counsel to assist him in his defence. I cannot so construe the statute. The State has its lien from the arrest or from the indictment, whichever takes place first, upon the property, both real and personal, and the first instruction asked as above by the defendant is the law and ought to have been given.

I am inclined to think that the second instruction likewise should have been given for the defendant, and such being my opinion of the law governing this case, the plaintiff's instruction given by the court to the jury is incorrect and ought to have been refused. The court erred therefore in refusing to give the instruction prayed for by the defendant below as above set forth in this opinion, and erred also in giving the plaintiff's instruction as set forth above.

The motion for a new trial ought to have been sustained. For these errors, therefore, the judgment of the circuit court of St. Louis county is reversed. I consider the arrest of the plaintiff, Spain, by Captain McDonough as a valid one so as to attach the lien of the State upon the goods and chattels of said Spain from its date. His having no warrant is a circumstance of no importance. The arrest was made, and it seems to have turned out a very efficacious one.

JOHNSON & CAIN vs. STEAMBOAT LEHIGH.

A bond is binding upon all the obligors who sign, seal and deliver it, although the names of part of the obligors be omitted in the body of the bond. The case of *Adams et al. vs. Wilson*, 10 Missouri Reports 341, overruled.

ERROR to St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

This was an action under the statute entitled "an act concerning boats and vessels," brought to the September term, 1847, of the St. Louis court of common pleas, by the plaintiff against

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the steamboat Lehigh, for the malperformance of a contract of affreightment. A warrant issued and the boat was seized by the sheriff of St. Louis county, and afterwards discharged by the sheriff on bond being given under the 9th section of the above mentioned act.

The said bond was signed sealed and delivered by Oliver Harris, Lewis F. Lacey, and others as securities, and was returned by the sheriff into court with the warrant and complaint, as required by law. In the bond so executed and returned, the names of Harris and Lacey were not inserted in the body of the instrument. The names of the principal and other securities were in the body of the bond, and a space was left for the insertion of other names. The boat pleaded the general issue. Afterwards a trial was had, and on the day of , 1849, of the September term, 1849, a judgment was rendered in favor of the plaintiff and against the boat and the principal and securities on the bond, including Harris and Lacey. Thereupon Harris and Lacey, by motion, asked the court to set aside, quash and annul the judgment as to them, on the grounds that they were no parties to the suit, that the said bond was not their deed, and that the said bond was not obligatory on them, because their names were not inserted in the body of it. The court sustained their motion and set aside the judgment as to them. The action of the court in setting aside the said judgment as to Harris and Lacey, is assigned by plaintiffs for error, and is the only question now before the supreme court to be decided.

M. L. GRAY, for plaintiff in error.

The plaintiffs in error contend that the bond was the bond of Harris and Lacey, though their names were not in the body of the instrument. They claim this to be the law both on authority and principle.

Harris and Lacey do not deny that they did not sign, seal and deliver the bond as theirs and with the intent of being bound. Admitting this, they seek on the ground of a clerical omission to escape liability, which they and the parties intended to assume at the time of executing the bond. They put their names and seals to the instrument obviously for some purpose, and for what, unless to bind themselves? 2 Coke p. 203.

The reasoning in the case of Powell vs. Thomas, 7 Mo. R. p. 440, will forcibly apply to this case.

The bond was valid, legal and binding on Harris and Lacey, notwithstanding the omission of their names in it. I find the authorities are uniform in favor of this position. 1 Stewart's R. (Ala.) 479; 4 Hayne 239; Brayton's R. 38; 4 McCord 203; 2 Bailey 199; 7 Cow. 484; 2 H. & M. 358; 4 Munf. 380; 4 Dev. 272; 2 Dana 463; 2 Litt. 286; 2 Coke 261; Bac. abrdg., obligation C; 6 Mass. 519.

Even if the bond were defective by reason of the clerical omission, the signing, sealing and delivering was an authority to fill up the blank. 5 Mass. R. 538; 3 Bibb. 361.

RYLAND, Judge, delivered the opinion of the court.

From the above statement, there is only one question for our adjudication. That is, does the omission of the names of Harris and Lacey in the body of the bond, though the bond is executed by them otherwise, render the bond void as to them?

The plaintiffs in this court contend that it does not; the defendants that it does.

The defendants rely upon the cases reported in the 10th Missouri Reports, Adams et al. vs. Wilson, page 341, and Wood & Oliver vs. Ellis, admr. &c., page 382.

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In these cases this court did decide upon the authority of Tucker's Com. page 265, that such omission of the names of the persons in the body of the bond, although their names were subscribed to the bond, rendered the bond void as to them.

This court has had occasion since these decisions to investigate this matter more thoroughly, and upon full examination we find that the authorities cited by Judge Tucker do not warrant and support his conclusions.

That such omission to insert the names of the persons in the face of the bond and within the body of the bond, if the bond be by such persons subscribed, will not vitiate the bond and render it void, is supported by a string of authorities, of such weight and learning as to render it strange how Judge Tucker could have adopted a different opinion. See the authorities cited by counsel in his argument.

This court, in two different cases since those reported in 10th vol., has determined this point contrary to the views contained in those opinions.

I am clear that the court below erred in setting aside the judgment in this case. This error was produced by the lower court following the decisions above cited from 10 Missouri Reports. These have since been overruled as regards this point.

The judgment of the court of common pleas is therefore reversed, and cause remanded.

CHARLES FABER vs. LORENTZ BRUNER.

Where the circuit courts refuse to set aside a judgment by default, the supreme court will not interfere, unless it appears that injustice has been done to the party complaining.

ERROR to St. Louis Court of Common Pleas.

WHITTELSEY, for plaintiff in error.

That this court will sometimes review the discretion of the courts below, see case of Stout vs. C. & T. Lewis, 11 Mo. R. 438. In New York it is the constant habit to set aside judgments by default at the same time, upon affidavit showing meritorious defence and due diligence, or an excuse for the want of it.

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By the code of 1845, p. 815, sec. 42, upon an interlocutory judgment, the equity of damages shall be made at the next term after the default, unless the court direct it to be made at the same term. In this case the court made the order for an assessment of damages at the same term, but gave the defendant no day in court, no notice was given to the defendant, and that too in a case where most especially the defendant should have had an opportunity of at least showing some mitigating circumstances, or of showing the condition in life of the parties.

The case of *Evans vs. Bowlin*, 9 Mo. R. 406, seems to cover this precise point fully. The law was the same then as now, the statute was the same. No notice was given by the docket when the damages would be assessed. The docket was not made out and exposed in the clerk's office as required by law. But farther still the damages were not assessed upon the day upon which the cause was set upon the docket. But they were assessed upon a day when the party was not required to be present at a time of which he had no notice, appointed without authority of law, and for these irregularities, the defendant is entitled to have the assessment of damages set aside, and a new writ of enquiry was awarded. Rev. Code 815, sec. 42; *Evans vs. Bowlin*, 9 Mo. Rep. 406.

By revised code 1845, p. 132, sec 14: Every clerk is required before the commencement of the term to make out a docket of all cases for trial, enquiry of damages, &c. There is no pretence that in this case any such thing has been done.

The plaintiff contends in this case that upon the facts stated in the affidavit of the defendant below, that the defendant had good reason to believe that the matter between the parties was all settled, and the judgment by default was such a surprise, as should have required the court to set aside the default, and allow the defendant to plead.

2d. The fact that plaintiff remitted the sum of seven hundred and fifty dollars, shows that there was something out of the way, and unusual and unjust, or the plaintiff never would have consented to waive more than half of his verdict.

3d. The court below should have set aside the assessment of damages, because the same was taken irregularly, illegally and without notice to the defendant of the day that the damages would be assessed. See *Evans vs. Bowlin*, 9 Mo. R. 406.

HUDSON & HARVEY, for defendant.

The affidavit of Faber was insufficient to set aside the judgment by default. The affidavit discloses no diligence on the part of the defendant below. *Green vs. Goodloe*, 7 Mo. Rep. 25.

That because plaintiff made professions of friendship to defendant cannot surely excuse him from the examination of a suit which was then actually pending against him.

As the motion to set aside the judgment by default was made after the assessment of damages, said motion ought not to have been allowed. See code page 814, sec. 37.

By the 1st section of the 3d article under the head of Practice at Law, code, page 839, "Every defendant served with process fifteen days before the return day thereof, shall appear," &c.

By the law as it existed before the statute of 1845, an *imparlance term* was allowed. Hence the case of *Evans vs. Bowlin*, 9 Mo. Rep. page 406, is not applicable to this case at bar.

We insist that under the law approved March 27, 1845, all causes where the process was served fifteen days before the return day of the September term, 1846, were triable at that term, and as the process in the case was served more than fifteen days before the return day thereof, the defendant Faber, like all other defendants, at that term was bound to make his defence.

RYLAND, Judge, delivered the opinion of the court.

From the statement of this case the questions before us involve the

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proper exercise of judicial discretion in the court below; arising on the want of diligence on the part of defendant.

This court has almost invariably refused its interference in such cases—deeming the lower courts fully competent to the proper exercise of such discretion.

Lord Coke defines judicial discretion to be, "*discernere per legem, quid sit justum*," to see what would be just according to the laws in the premises.

It does not mean a wild self-willfulness, which may prompt to any and every act; but this judicial discretion is guided by the law—see what the law declares upon a certain statement of facts, and then decide in accordance with the law—so as to do substantial equity and justice.

In many of the cases coming before this court, had I been on the bench in the lower court, I should, in all probability, have made quite a different decision. But as the lower courts have the best opportunity to know the facts; as these courts must from necessity see more of the real history of the cases—as they have before them the parties, their counsel, the witnesses and the jurors—as they have the opportunity of seeing the cases under all the various shades of light; it is but proper to suppose that the exercise of judicial discretion by them will always be as sound and as prudent, as it can be in an appellate court—which sees everything that touches the case, through the same cold, uniform medium, the record alone.

There is nothing in the case which strikes us as an improper exercise of that common discretion of courts of justice.

Here a party has been sued for crim. con. The plaintiff just before he leaves this State as a volunteer for the war with Mexico, sees the defendant, and they have a conversation, not about this suit, but a friendly talk—from which the defendant supposes that the suit is to be stopped or dismissed. Yet the plaintiff gave him no such information. He takes it for granted. The defendant made no efforts to ascertain whether the suit was dismissed or not—judgment is rendered against him by default—more than a month after this interlocutory judgment elapses, before the writ of enquiry to assess the damages is executed.

After the liability is fastened on this defendant, by a heavy verdict, he then comes forward, and moves the court to set aside the judgment by default, and also the assessment of damages, and permit the defendant to plead and defend the action.

The writ of enquiry is ordered to be executed at the same term of the court at which the judgment by default is rendered, in pursuance of the

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42d sec. of the 3d article, of the act to regulate practice at law—Rev. Code 1845, p. 815.

During the pendency of the defendant's motion to set aside the assessment of damages and also the judgment by default, the plaintiff remitted the sum of seven hundred and fifty dollars of the damages, which had been assessed by the jury.

This act of the plaintiff's attorneys is looked upon by the defendant and offered as a reason why the judgment should be set aside. It is urged as evidence of the plaintiff's unwillingness to meet the case fairly—as evidence that he fears the light—all this may be so—but still all this does not do away with the necessary use of proper diligence on the part of the defendant.

The record in this case, especially the rejected affidavits which it seems were offered by the plaintiff below on the above motion, place the negligence of the defendant in the rank of the grossest character.

We feel unwilling to disturb the judgment below, all the difficulty, and hardship of this case, if there be any, arise upon the mere careless neglect of the defendant.

As to the point, about notice of the trial of the writ of enquiry, the want of such notice is attributable to the defendant. He might have found out the day of the execution of the writ if he had made enquiry—but he neither sought to defend the action, nor to attend the assessment of damages. We consider the court having the power to order the writ to be executed at the same term, and its being thus executed, as proper.

Upon the whole case then, we find nothing requiring our interference. Judgment is therefore affirmed.

JAMES MAIDS vs. JOHN H. WATSON.

The judgment required by the 8th section of the act regulating the action of replevin, in case the plaintiff fails to prosecute his suit with effect and without delay is a final judgment. When such judgment is rendered by the Law Commissioner for the county of St. Louis he cannot set it aside.

ERROR to St. Louis Court of Common Pleas.

N. & S. A. HOLMES, for plaintiff in error.

Is the judgment required by the replevin act, in case the plaintiff fails to prosecute his

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suit with effect and without delay, a final judgment? It is insisted that it is, and made so by the very terms of the act. Rev. Stat. 1845, chap. 145, sects. 8 and 9; Smith vs. Winston, 19 Mo. Rep. 299, 301.

2d. Our statute is almost precisely like that of the 17 car. 2 cap. 7, which, in case of non-suit after *avowery* made for rent in arrear, makes the judgment final. Bac. Abr. vol. 6, 85; Vin. Abr. vol. 18, 596, 597; Tellons Pr. 2 p. 251, et seq.

3d. A justice of the peace has authority to set aside a verdict and grant a new trial only in certain excepted cases, of which exceptions this is not one. Cason vs. Tate et al, 8 Mo. Rep. 45. His act, in this instance, was wholly irregular and void, and it was his duty to compel the performance of which a mandamus will lie, to vacate his order granting a new trial, and to issue execution on the judgment.

Judge BIRCH, delivered the opinion of the court.

On the 30th of August, 1847, a writ of replevin, to recover the possession of various articles of furniture, alleged to be wrongfully detained by the plaintiff in error, was sued out by one Wimer, before the law commissioner of St. Louis county. The writ was made returnable on the 15th of September following, but the trial was continued, on Wimer's motion, to the 22nd, on which day, (the plaintiff not appearing,) the commissioner proceeded to hear the testimony of the defendant, and to assess the value of the property and damages, and rendered judgment against the plaintiff and his security accordingly. On the 26th of September the plaintiff appeared and moved to set aside the judgment thus rendered, and the motion being sustained, the case was again set for trial on the 4th of October. On the third of October, the defendant appeared and moved to vacate the order granting a new trial, and for execution upon the original judgment. This motion having been overruled, on the 8th of October the plaintiff in error filed in the St. Louis court of common pleas his petition for a mandamus to compel the commissioner to vacate his said order and issue execution on the judgment; to which petition, upon the return of the alternative writ, the commissioner filed his answer, substantially admitting the facts stated in the petition, but insisted and relied that the original judgment was but interlocutory, and he therefore had the power to set it aside. To this answer there was a demurrer, which being overruled, the case comes here by writ of error.

By the first section of the supplemental act respecting this officer, (approved February 11, 1847,) he has a concurrent jurisdiction with justices of the peace in reference to "all actions and proceedings" to which jurisdiction was confided to them in the second and third sections of the first article of the justices law, and was to "receive the same fees, and be subject to the same rules and regulations which apply to

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and regulate proceedings in justices' courts." The present, however, is not an "action or proceeding" of that nature, being one specifically provided for in the second section of the act alluded to, in which "concurrent jurisdiction with the circuit court" is given "in all actions of detinue and replevin, wherein the matter in controversy does not exceed one hundred and fifty dollars." This section simply further enacts that he shall "receive the same fees in all such cases as in other actions cognizable before him"—*omitting* the phraseology employed in the first section, which analogises his proceedings in reference to the subjects of jurisdiction confided to him by *that* section, to "the rules and regulations of justices' courts," it would seem, therefore, that the power to set aside judgments in replevin was rather *purposely* withheld, and that the 8th and 9th sections of the replevin law itself furnished the imperative and only true rule.

Those sections are as follows:

"Sec. 8. If a plaintiff in replevin fail to prosecute his suit with effect, and without delay, the court or jury shall assess the value of the property taken, and the damages for the use of the same, from the time of issuing the writ, until return thereof shall be made, as in other like cases.

"Sec. 9. In such cases, the judgment shall be against the plaintiff and his securities, that he return the property taken, or pay the value so assessed, at the election of the defendant, and also pay double damages assessed for the detention of the property, and costs of suit."

It would seem from these sections that the commissioner had no authority "to assess (as he did) the value of the property taken, and damages for the use" thereof, without having previously found that the plaintiff had "failed to prosecute his suit with effect and without delay," and that having found that, his remaining duty, either by himself or through a jury, became imperative, not optional—final, not conditional. The only judgment that could thereafter be rendered *was* rendered—and why? Because the plaintiff having chosen this particular form of proceeding, did not "prosecute his suit with effect, and without delay," did not comply with the law he was proceeding under, whereby the defendant became entitled to the restitution of his property, or damages commensurate with its detention, which was rendered and entered accordingly.

In the case of *Smith vs. Winston*, (10 Mo. 301,) this court, after remarking upon the phraseology of the statutory provision alluded to, in connexion with analogous decisions in England, decided that the defendant was "entitled to the judgment specifically pointed out by the

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act," in case of a non-suit, that being a failure to prosecute his suit with effect. If therefore a non-suit was even entered in consequence of such a failure, a final judgment upon that non-suit (such as was entered) would seem to be the only one contemplated or authorized by the law; and it appearing that that was ascertained and entered, we can but think that the discretion of the commissioner was at an end.

The judgment of the court of common pleas is therefore reversed, and the case will be remanded for a peremptory mandamus as prayed for in the petition.

JOSEPH HATRY vs. EDWARD SHUMAN.

The plea authorized by the 25th section of the act concerning attachments, by which the defendant puts in issue the truth of the facts alleged in the plaintiff's affidavit, *is a plea in abatement*. If after filing such plea, the defendant files a plea to the merits of the action it is a waiver of the plea in abatement.

APPEAL from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

Edward Shuman brought suit by petition in debt in the St. Louis court of common pleas, against Joseph Hatry, and sued out an attachment thereon. At the return term, and within the two first three days of the term the defendant filed a plea in abatement, and also, but afterwards, and on the same day filed a plea to the merits.

The plaintiff moved to strike out the plea in abatement for the reason that the defendant had pleaded to the merits of the action. While said motion was pending the defendant asked leave to withdraw from the files, his plea to the merits, but the court refused to grant him such leave, and sustaining the plaintiff's motion, struck out the plea in abatement, and afterwards rendered judgment against the defendant for the amount of the plaintiff's demand. The defendant now appeals from the judgment of the court refusing him leave to withdraw his plea to the merits, and striking out his plea in abatement.

HAREN & BAY, for appellant.

1. The court erred in striking out the plea in the nature of a plea in abatement. The statute gives the defendant, the right to contest in his own manner, the truth of the plaintiff's affidavit, and the court had no discretion in allowing or refusing the plea. Revised Statutes of 1845, title "Attachment," p. 139, 140.

2. The filing of the plea to the merits was merely to prevent a judgment by default in case the issue on the plea in the nature of the plea in abatement was decided against the defendant. The

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8th section of the 3rd article of the act concerning "Practice at law" R. S., p. 810, requires that "every plea to the merits of the action, shall be filed on or before the sixth day of the term."

3. Even if the court had a discretion in striking out the plea, it was improperly exercised, and did great injustice to the defendant, for the plea to the merits, pending the plea in abatement, was at most a mere irregularity. Leave to withdraw a plea to the merits is generally granted as a matter of course. At least, the court should have permitted the defendant to elect by which plea he would abide. 1 Johnson's cases 105, Le Conte vs. Pendleton; 1 Dunlap's Practice, 471.

BLANNERHASSETT & SIMMONS, for appellee.

1st. The statutory plea to the affidavit in an attachment suit is, in its legal construction, a plea in abatement of the attachment writ, for matter debars the record, and like any other debatable plea is waived by a subsequent plea to the merits of the action. 3rd Stewart's Rep. Cleveland vs. Chandler, 489; 10 Mo. Rep. 274.

2nd. There is no force in the second point made by the appellant. If his plea to the affidavit had failed on trial he could still have plead to the merits of his cause. It is the invariable practice in the St. Louis courts to grant this privilege in all similar cases, and the appellant would also have been entitled to it upon general principles.

3. The court of common pleas committed no error in refusing the appellant leave to withdraw his plea to the merits of the action. The evident object of the appellant, was to let in his plea in abatement, which the court very properly at the time, would not permit. Vide Caine's cases vol. 3, p. 102. The motion for that purpose was merely a verbal one, and no reason was assigned in support of it. It was not made until a month after the plea was filed, and then at the time when the motion to strike out the plea to the affidavit was called for a hearing.

RYLAND, Judge, delivered the opinion of the court.

From the above statement the only point for the consideration of this court, arises from the action of the court below in striking out the defendants plea putting in issue the truth of the affidavit, on which the attachment issued in this case.

This plea is said, by the statute permitting the defendant in attachment to file it, *to be a plea in the nature of a plea in abatement*. Such a plea has been heretofore considered by this court to be "a plea in abatement." See Livengood vs. Shaw, 10 Mo. R. 276. I am of the opinion that this is the correct and proper construction, and that such a plea is simply a plea in abatement. It is governed by the same rules and liable to the same consequences as it partakes of the nature of a plea in abatement.

The defendant in the court below filed on the same day his plea to the merits of the action, after he had first filed his plea in abatement. The plaintiff subsequently moved the court to strike out the plea in abatement, because the defendant had after filing it, plead to the merits of the action. The court sustained this motion, struck out the plea in abatement. The trial was afterwards had upon the merits, and the plaintiff obtained judgment.

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During the pendency of the motion of the plaintiff to strike out the defendants plea in abatement, the defendant moved the court for leave to withdraw his plea to the merits, this was refused. The defendant excepted to the opinion of the court in refusing him leave to withdraw his plea to the merits, also excepted to the opinion of the court in striking out the plea in abatement.

The filing of a plea to the merits after one in abatement had been filed, was, in my opinion, properly considered by the court below a waiver of the plea in abatement, and the court decided correctly in striking out the plea.

I find no fault with the court below in refusing the defendant leave to withdraw his plea to the merits.

Delatory pleas—pleas in abatement, have never met with much favor in courts of justice—nor do I feel inclined to reverse this feeling.

From the whole view of the case then, I am inclined to think the court below decided properly and that its judgment should be affirmed.

Its judgment is accordingly affirmed.

MCDONALD & REW vs. JACOB FORSYTH, ET AL.

Under the statute of this State an attachment cannot issue in an action of *tor*—process of attachment is confined to actions upon contracts.

ERROR to St. Louis Circuit Court.

STATEMENT OF THE CASE.

The defendants were owners of the steamboat "Pioneer," in March, 1849, and the plaintiffs were owners of a warehouse, standing at Beardstown, on the bank of the Illinois river. The plaintiffs sued defendants in case alleging that through the negligence, carelessness and fault of the defendants' servants, managing said boat unskillfully, the boat was run against the said warehouse, and prostrated its walls, and removed the building from its foundation, and greatly damaged it.

The proper affidavit was made and the steamboat Pioneer attached as the property of non-residents, and to bring them within the jurisdiction of the courts of this State, and proper bond filed for their protection.

The defendants moved the circuit court to dissolve the attachment.

1. Because suit did not lie by attachment for such cause of action.

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2. Because the plaintiffs are not creditors, nor the defendants debtors, mutually.

3. Because there is no indebtedness from the defendant to the plaintiff.

The court granted this motion and the plaintiffs excepted.

The suit was then dismissed on a stipulation between the parties that no exception should be taken for such dismissal, and no errors assigned thereon in this court—and accordingly, the only error assigned is the dissolving the attachment.

CROCKET & CASSON, for plaintiffs in error.

The non-residence of the plaintiff furnishes no ground of distinct consideration. The question is to be regarded as if the action were brought by a citizen of this State. *Posey vs. Buckner*, 3 Mo. Rep., 413; *Graham vs. Bradburry*, 7 Mo. R., 281.

Whereon there is a "debtor," there must, of necessity, be a "creditor." The artificial definition of the word "debtor" is evidently too narrow, having reference to an obligation to pay an amount ascertained by judgment, or by a sealed instrument, or in the case where the action of debt is specially given by statute, &c. It will be conceded, and the practice in this State proves, that this attachment lies upon simple contract, express or implied; and the terms "debtor and creditor" are used in actions of assumption universally, and on an account current with interest account; attachment also lies *for damages for breach of contract*. *Brady's vs. Hill et al.*, 1 Mo. 226.

It is clear also, that it will lie whereon a technical "action of debt" would lie, for wherever there is, in the language of the law, a *debt*, there is necessarily a "debtor."

In all the following cases, therefore, there is a "debtor," for in them all, "an action of debt" lies.

Where there was no contract for the amount of compensation for work and labor done, the damages being wholly unliquidated, debt lies.

And for an unliquidated penalty given by statute, and penalties for malfeasance.

Also on a *quantum meruit* where the damages are wholly matter of proof. *Thompson vs. French*, 10 Serg. 452; *Rockwell's case*, 11 Ohio, 130; *Jacob vs. U. S.*; 1 Brock, 520; *Van Dusen vs. Blum*, 18 Pick., 229.

Debt lies on a sealed instrument, where an *unliquidated demand*, reducible to a certainty, is sought to be recovered. *Wetumpka vs. Hill*, 7 Ala., 772.

Also on a bond to secure good behaviour, and the performance of official duty, although the damages can only be ascertained by proof *extra*.

Also, generally upon statutes for penalties, and for damages regulated therein. *Bacon Ab't. "Debt."*

Also, generally upon a special contract, but not on a *promise*, for this last is *assumpsit*. *Simonton vs. Barret*, 21 Wend., 362.

Debt lies for the treble damages given by statute for damage to real estate, &c., though the amount is wholly unliquidated, until the trespass and actual amount of damage are proved in court at the trial. *Papin vs. Ruelle*, 2 Mo. 26.

The word "deb" denotes any kind of a just demand. "Debtor is one who may be constrained to pay what he owes." "Creditor is he who has the right to require the fulfilment of an obligation or contract." *Bouv. L. D. "Debtor;" do "Creditor."*

An endorser, who is merely liable to pay on a contingency, is a "creditor" under assgt. law. *Duval vs. Raisin*, 7 Mo. 449.

An unliquidated claim for damages is a "debt" within the meaning of the statute of Massachusetts, making individual members liable for the "debts" of manufacturing corporations, a decision not merely affecting remedies, as in this case, but rights and liabilities. *Milldam Foundry vs. Hovey*, 21 Pick. 454.

Actions on the case for damages, and assumpsit on an implied promise, are so nearly allied that they are to be distinguished in law.

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Where *trover* will lie, *assumpsit* will also lie, if the plaintiff chooses to waive the tort. *Johnson vs. Strader*, 3 Mo., 254.

In New York, under the insolvent laws, a discharge operates upon debts arising *ex delicto* as well as *ex contractu*. Claims arising from trespass have been decided to be discharged, under that statute, using the same language as this in question, which is an authority very much in point. *Latham vs. Dezo*, 19 Wend., 629, and note thereto.

The construction supported by the preceding arguments is also enforced by the language itself so fully as to leave no doubt of the legislative intention. Ch. 11, sect. 1, sects. 1 and 2, sects. 51 and 52, sects. 53 and 54, sects. 2, 51.

But the position of the defendant is shown by the statute to be tenable only before a justice of the peace, or on a motion for an attachment subsequent to the commencement of the suit, and the distinction taken in the act shows conclusively the meaning of the statute. It limits in no respect the jurisdiction of the circuit court in matters of attachment originally. Art. II, sect. 1; art. I, sect. 41.

It does limit it in attachments pending suit. Sec. 41, art. I, (q. v.)

And it does limit justices of the peace to the precise position taken by the defendant; i. e. that it applies only to actions arising "ex contractu." Art. II, sec. 1; art. I, section 64, (q. v.)

The limitation in the last instances proves the freedom from the like limitation, (by implication,) in the first.

It is only the verdict of the jury which can ascertain the truth of the affidavit of indebtedness, and the court cannot anticipate it by an order.

Polk, for defendants.

I. The only question in this cause is, whether a writ of attachment could be legally issued? I maintain it could not. Code of 1845, p. 133, sects. 1, 2, 3, 6, 41, 64; 1 Tidd's Practice 122, 144, 146, also 150, 151.

NAPTON, J., delivered the opinion of the court.

The question in this case is whether a plaintiff in an action on the case for a tort has a right under our statute to an attachment.

The plain and obvious construction of the statute is, in our opinion, against the right to an attachment except in actions upon contracts. It is not our province to determine whether this distinction is a wise one, if it is manifest that the legislature have adopted it. There may be, as has been contended, many cases where damages for a wrong done is the object of the suit, in which the plaintiff's right to this extraordinary process of the law might be maintained upon principles of expediency and justice, whilst it must be admitted, that there are many others, in which the propriety of withholding the attachment is quite as obvious. A distinction had to be drawn, and the line fixed by the statute is probably about as satisfactory as any other which could have been adopted.

The first section of our attachment law provided that *creditors* may

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sue their *debtors* by attachment, in certain specified cases. Upon the use of these general terms of creditor and debtor is founded all the argument which can be made to support the position of the plaintiff in error. I regard the terms as sufficiently definite, to exclude all idea of embracing within the law any demands except such as grow out of contracts. The words do not, in ordinary acceptance, nor in strict legal parlance, apply to any other class of demands. It is true, that the state law has made demands, not founded upon contract, debts, which were not so originally, as in certain statutory penalties recoverable by an action of debt; but this is only an exception to the general rule, and it does not prove that all other demands or claims of a similar nature, are debts, and create the relation of debtor and creditor.

But without entering upon any critical examination of these terms, I think, that the subsequent provisions of the act, taken together or viewed separately, are a legislative interpretation of the meaning of those terms as used in the first section of the act, and sufficiently limit their application to the class of cases already alluded to. The first forty sections of the law are upon the subject of original attachments, the forty first section then commences with a series of provisions for attachments in the progress of a suit, and reads thus: "Any plaintiff in an action of debt, covenant or assumpsit, which shall have been commenced by summons, and without original attachment, may, at any time pending the suit, and before final judgment, sue out an attachment in such action on filing an affidavit and bond as required in cases of original attachment."

What motive could there be for limiting these auxiliary attachments, if original attachments were permitted in all cases? I cannot conjecture any plausible reasons for making such a distinction. The words plaintiff and defendant are substituted for creditor and debtor, merely for convenience, and the use of these words rendered it necessary to limit their general meaning by specifying the forms of action, to which it was intended to confine the process. The change was a natural one, and I do not understand the words plaintiff and defendant to have any other meaning than the words creditor and debtor in the first section. But if we look further, we see this same distinction running through the whole law.

The 64th section points out the jurisdiction of the several courts—a matter regulated altogether by the amount involved. "The circuit court and justices of the peace shall have concurrent jurisdiction in attachment causes, where the demand sworn to is not less than fifty dollars, nor more than one hundred and fifty dollars, and shall be evidenced

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by a bond or note for the direct payment of money, and where the demand sworn to should be less than fifty dollars nor more than ninety dollars, and shall be founded on a contract other than a bond or note." Nothing is said here about actions *ex-delicto*, in some of which justices of the peace had jurisdiction. If they were embraced in the first section of the law, no reason can be perceived why justices of the peace should not have shared in this jurisdiction, where the amount in controversy did not exceed that to which the law regulating these courts had already limited them.

The same remark will apply to the first section of the second article. In this the jurisdiction of justices in attachment cases, is specially defined. It is admitted that no power is given to them to issue attachments in any action *ex delicto*. No mention is made of such actions. Justices of the peace had jurisdiction in actions of trespass, to the amount of fifty dollars, and concurrent jurisdiction with the circuit courts in such actions, where the damages claimed were between twenty and fifty dollars.

If any action founded on a tort is embraced within the first section of the attachment laws, all such actions must fall within the same construction, and we shall then have a plaintiff in an action for slander entitled to his attachment. This is so contrary to the general spirit of the act itself and so little in accordance with justice or propriety, that we would naturally expect so important an innovation to be clearly defined and not left to nice constructions.

Judgment affirmed.

ELIAS T. LANGHAM AND OTHERS VS. JOHN F. DARBY, AD'MR.

Plaintiffs, heirs of A., joined others in a suit for partition of certain lands; an order of sale was made; before the sheriff made his report of the sale, defendant, who was the administrator of A., applied to the court for an order that the proceeds of the sale going to the heirs of A should be paid over to him for the benefit of the creditors of A. The court, having been first satisfied that the estate was insolvent, made the order.

Held,

That the order, although somewhat informal, must stand, complete justice having been accomplished by it.

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ERROR to St. Louis Circuit Court.

STATEMENT OF THE CASE.

A suit in partition wherein above plaintiffs in error and John O'Fallon and others were petitioners, and Martin Tayon and others defendants, was commenced in the St. Louis circuit court, 3d September, 1846. On the 26th April, 1847, an order of sale was made by the court, which was renewed on the 16th March, 1848. The sale was made on the 3d May, 1848, the proceeds whereof were \$43,619 96, and the sheriff filed his report thereof on the 11th May, 1848, which was approved on that day. On the 29th April, 1848, Bailey, administrator of Angus L. Langham filed his petition in said suit setting forth that above plaintiffs in error were the only heirs at law of Angus L. Langham, and that one-tenth of the land sought to be divided in said partition belonged to the estate of Angus L. Langham, and, of course the tenth of the proceeds; that said plaintiffs in error, the heirs, were not entitled to the proceeds of the sale, as the estate was greatly insolvent; that accounts allowed against said estate unpaid amounted to \$45,754 25, among which was a judgment in favor of the United States for \$4,872 76, which was allowed in St. Louis Probate Court against said estate, in the year 1839, that the said government debt is a lien, and that all said debts are by law liens, and to be satisfied before said heirs could be entitled to anything, and praying for an order that the proceeds should be paid to him.

The court made the order accordingly before the sheriff made report of said sale, having taken proof, and been satisfied thereby of the insolvency of said estate and that the tenth of said proceeds would pay but a portion of said allowed demands against the estate of A. L. Langham.

On the 13th May, 1848, E. T. Langham and the other heirs of A. L. Langham made their motion to set aside said order, because, 1st, it was imprudently made; 2nd, that Darby was no party to the suit; 3d, that the heirs had no notice of Darby's application; 4th, that said order was against the statute of partition. Sec. 40.

At the November term, after the money had been paid over to Darby under the order, to wit: 22nd January, 1849, the motion was argued and overruled, and an exception taken to that decision.

The only question arising on the record is, whether the order of payment to Darby should have been set aside.

GAMBLE & BATES, for plaintiffs in error.

The circuit court had no authority to order the payment of the money of the plaintiffs in error to the defendant in error. The acts of the General Assembly prescribe the duties of administrators with regard to real estate, and the only mode in which they may dispose of real estate. Rev. Laws, 1845, title "Administration," articles 2 and 3. An administrator cannot be a party to proceedings for partition. He has no title to real estate, but only a power to sell under the order of the county court for the causes and in the manner prescribed in article 3 of the administration law.

The heir may sell land by private contract, subject however to the administration of the estate, and the purchaser takes only the title of the heir, which would be inferior to a title acquired under a sale by the administrator made in legal form and for proper cause. In like manner a sale made in partition conveys only the title of the heir, subject to the administration. The administrator's right to sell for the payment of debts is not disturbed, and he has no right whatever to the proceeds of the sale by the heir in partition. He would have had no right to the proceeds of the sale of the heirs interest by private contract or under execution, and has no right to the proceeds of the sale of his interest in partition.

The 40th section of the act respecting partition, enacts that the nett proceeds of such sales

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shall be paid to the parties whose rights and interests shall have been sold, or to their guardians or legal representatives. Darby's right as administrator to sell has not been impaired, and he may yet sell the land for the payment of the debts of Angus L. Langham. His interest in the land was not sold in the partition sale, and consequently he has no right to any of the proceeds of that sale.

Further, the circuit court had no authority, upon the motion of the administrator, a stranger to the record, (and without notice) to order the payment of the money of the plaintiffs to him, even had he a right to the money, which he unquestionably had not.

SPALDING, for defendant error.

1. The interest in the land belonging to the deceased, Angus L. Langham, his heirs and administrators were his representatives, and the proper parties in the suit of partition, to represent that interest. Rev. Code of 1845, page 766, section 2, 3.

2. But Elias T. Langham, one of the heirs of A. L. Langham was a party petitioner originally in the suit, *he being at the same time the administrator* of Angus L. Langham.

3. Before the suit terminated, his letters were revoked, and J. F. Darby was appointed administrator *de bonis non* of Angus L. Langham; and soon after intervened as such in the suit and procured an order that the money should be paid to him.

4. It was Darby's duty to have procured himself to be made a party, and although what was done was perhaps lacking in form, yet it is not void. He appeared in the suit, he exhibited his letters establishing his character as such administrator, which he might do without any notice to the other parties, other than by motion in open court. Rev. Code of 1845, page 766, secs. 3 and 4, 771, sec. 35—that the effect of the sale is to bar rights in equity.

5. Darby having shown the probate records that Angus L. Langham's estate was indebted to the amount of some fifty thousand dollars, without any other assets than this land, one of the debts being a special lien, and all of them allowed in the probate court, it became the duty of the court to order the money into his hands. It would then be applied to the purposes of the estate, and the residue, if any, after the payment of debts, would go to the heirs, being guaranteed to them by the administration bond of Darby.

6. Such a disposition of the money would not be in violation of the act providing for partition of land, but in consistency with it. Rev. Code 1845, p. 772, sec. 40, directs that the money raised by a sale shall be "divided among the parties whose rights and interests shall have been sold, and paid to them, their guardians or legal representatives;" and section 41 indicates that the words "parties in interest," not "parties to the suit."

7. The case is not one coming within the provision of the 42nd and following sections. The 43 section provides a mode of proceeding when a party claims the money as *owner* of the premises sold, which does not include the present case, of an *administrator* and heirs of a deceased person. This is not the case of "adverse claims" to a share. It is, of the representations of the same share, whether the money shall be paid to one or to the others, whether it shall be paid to the heirs, and leave the creditors to sue them to get it, or shall be paid to the administrator, which would expedite the payment to the creditors; for in either case the creditors are entitled to the money. It belongs to them in equity.

I hold that the sale in partition by order of court, passed the title, indefeasible, and that the administrator could not sell again. He had no estate in law or equity in the land, either in reversion or remainder. All the persons required by the statute were made parties. But the heirs in such cases, hold the title for the benefit of the estate; and if partition is made, it binds the administrator; that is, the land of the deceased is set off in severalty, instead of remaining, as before, an undivided interest; and the administrator has the same power over it as he would have had, if the partition had not been made.

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RYLAND, Judge, delivered the opinion of the court.

From the above statement, the single question before this court involves the propriety of the order of the circuit court, directing the proceeds of the sale of the property by the sheriff to be paid over to Darby, the administrator. The commissioners reported that the land was not susceptible of partition without loss to the owners. A sale was ordered and made; and before report of such sale by the sheriff, Darby moved the court to have the money coming to the heirs of Langham, that is one-tenth of the amount of the sale, paid over to him, for the benefit of Langham's creditors, he having satisfied the court by proof that Langham's estate was largely indebted beyond the share of the proceeds of said sale coming to it.

The heirs of Langham object to Darby's being permitted to appear in this proceeding. But, under our law the heirs of Langham must give way to his creditors. Darby represents them in this business; he adopts the sale of real estate thus made, and by his act sanctions it. I am not willing to force Darby to proceed to have this land sold over. It is better for all parties interested really to abide by the present sale. The heirs of Langham, under the facts in proof, have but a nominal interest, and although Darby might have been more formally introduced upon the record in this case; yet I am unwilling to disturb the order of the court, directing the amount coming to Langham's heirs to be paid to him as the administrator of said Langham.

I overlook all formalities, and where complete justice can be done in the premises by motion, and by the adopting of the partition sale by the administrator, I see nothing to be gained by directing a different proceeding. As to the want of notice, Langham's heirs were in court and did not need notice of Darby's motion; they knew it as soon as it was made.

Let the judgment below be affirmed.

THE TOWN OF CARONDELET vs. BEVERLY ALLEN'S EXECUTORS.

1. Plaintiffs sued the town of Carondelet in an action of debt; the process was served upon the chairman of the board of trustees; before the suit was called he ceased to be chairman, and another person succeeded him; a judgment by default was rendered: during the term the successor filed a motion to set aside the judgment by default; the motion was sus-

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tained by an affidavit "that the late chairman of the board of trustees, who had neglected to attend to the suit, had ceased to be such chairman, that the affiant was his successor, had attended to the suit as soon as he heard of it, and *was advised by counsel* that the town had merits and a just defence to the action;" the court refused to set aside the judgment by default. Held, that the circuit court did right—that although the affidavit could be held sufficient on the score of *merits*, it disclosed a want of diligence on the part of the corporation.

2. In a contract with A that in "consideration of the services rendered and to be rendered" by him, in certain suits mentioned, the defendants oblige themselves to pay him five hundred dollars *absolute'y*, and upon a contingency mentioned, the further sum of one thousand dollars. Held, that the death of A before the future services were rendered, could not affect the right of his administrator to collect the sum of five hundred dollars, with interest from the date of the contract.

APPEAL from St. Louis Court of Common Pleas.

R. M. FIELD, for appellant.

I. There was error in overruling the motion to set aside the default. For the case shows that the defendants had a meritorious defence, and the default arose from the change of the head officer of the corporation between the day of the service of the summons, and its return.

It is conceded that the reported cases in this State seem to require diligence on the part of defendants, but the rule, it is conceived, would have a different application to a corporation than to a natural person.

The service of the summons on the head officer of the corporation, was only constructive notice of the suit to the corporation, and the principle adopted by this court in *Sloane vs. Forse* (11 Mo. Rep. 126) applies. *Lecompte vs. Wash*, 4 Mo. Rep. 557; *Wimer vs. Morris*, 7 Mo. Rep. 6; *Greene vs. Goodloe*, Ib. 25; *Steigers vs. Darby*, 8 Mo. Rep. 679; *Field vs. Matson*, 8 Mo. Rep. 686; *Lament vs. Mullikin*, 10 Mo. Rep. 495; *Austin vs. Nelson*, 11 Mo. Rep. 192; *Stout vs. Lewis*, 11 Mo. Rep. 438; *Sloane vs. Forse*, 11 Mo. Rep. 126.

The rule of the common law is plain that a judgment by default will be set aside on an affidavit of merits, so that a term be not lost to the plaintiff *Tidd's Prac.* 507, 8. This rule was recognized by this court in *Field vs. Matson*, and it incontestably applies to the case now before the court.

II. The court below erred in its instruction to the jury on the assessment of damages. By the contract the testator was to receive \$500, in consideration of services rendered, and to be rendered. It appeared that the testator died before the services were completely rendered. The jury ought therefore to have been instructed to apportion the sum equitably, according to the services actually rendered, if the plaintiff was entitled to recover at all. See the cases collected in the notes to *Cutter vs. Howell*, 2 Smith's leading cases (Am. Edition.)

III. The instruction as to interest was clearly wrong. The party was only entitled to interest from the time the money was payable by the contract and that was the business of the court to declare. Under the instruction of the court the \$500, was payable on the decease of testator, and from that time only was interest demandable if the construction of the court was correct.

MULLANPHY, for appellant.

1st. That the affidavit to set aside the default was sufficient.

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- 2d. That on the inquiry future service of appellees' testator ought to have been proved.
3d. That the judgment below was excessive in amount.

COBB vs. appellees.

1st. The contrary opinion of a counsel in regard to the construction of a contract, does not make it imperative on a court to set aside its judgment. Affiant does not state that he believes, but that he is advised by counsel that defendant has means, &c.

2d. The 1st, 2d and 5th instructions asked by defendant's counsel and refused by the court, and the 2d and 3d given for the plaintiffs as also the decisions of the court, that it was unnecessary to prove either that the suits were determined or still pending; are all involved in the construction of the contract sued on—to-wit, whether the parties, when they expressly agreed that the \$500 fee should be paid "absolutely," intended to mean that it should not be paid absolutely, but conditionally—when in the same contract they agreed that the additional sum of \$1000 should be the conditional fee. It is insisted that the intention of the parties to the contract was to secure a retainer fee.

3d. Defendant ought not to object to the 1st instruction for interest. The damages instead of being excessive, might have been greater according to law.

4th. The 3d and 4th instructions asked by defendant's counsel are in favor of the plaintiff, and therefore defendant has no right to object to their refusal by the court.

5th. The declaration alleges all that is required to recover the amount sued for on the contract.

6th. The court was right in overruling defendant's motions in the case.

Judge BIRCH, delivered the opinion of the court.

A verdict was found, a judgment entered in the court below, upon a count in debt which recited and treated as a specialty or bond, an instrument of which the following is a copy:—"In consideration of the services rendered, and to be rendered, by Beverly Allen, Esq., in defence of the following suits, before any court in the county of St. Louis—to-wit: Bingham vs. Dent, Inhabitants of Carondelet vs. Rolan Brown, Same vs. Benjamin Allen, and Benoist Manschal vs. William Gibson, and in re-establishing the right of the Inhabitants of the town of Carondelet to commons north and south of the river Desperes—the inhabitants of the town of Carondelet oblige themselves to pay to Beverly Allen the sum of five hundred dollars absolutely, and in case of a final decision on said right to commons north and south of the river Desperes, favorable to the inhabitants aforesaid, whether by judgment of court or by sanction of the United States, the additional sum of one thousand dollars.

"In testimony whereof, the board of trustees of said corporation have hereunto affixed the common seal of said corporation. Done at Carondelet, this 30th day of March, 1840.

NOS. PAUPE,

Chairman of Board of Trustees,
Of the Inhabitants of Carondelet.

[SEAL]

P. L. McLAUGHLIN, Register.

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The declaration contained the usual averment, as to having rendered the future services, according to the tenor and effect of the instrument sued on. The writ was served upon Peter D. Barrada, chairman of the board of trustees of the town, on the 22d day of January, 1848, and on the 15th of February following, the case being called in course, and no person appearing for the defendant, a judgment by default was entered, and an inquiry of damages ordered to be made during the same term. On the 17th of April following, (the February term still continuing) before proceeding to the inquiry of damages, an ineffectual motion was made to set aside the judgment by default—the affidavit upon which it was founded alleging that “Barrada, late chairman of the board of trustees, who had neglected to attend to the suit, had ceased to be such chairman, that the affiant was his successor, had attended to the suit as soon as he heard of it, and *was advised by counsel* that the town had merits and a just defence to the action.” It may probably be as well to remark here as elsewhere, that if even such an affidavit as this, in the words we have it italicised, could be held sufficient on the score of *merits*, the question of *diligence* would still be adverse to the corporation, without allowing to it *greater* indulgence than is usually extended to individuals—so that we see no sufficient reason for revising the discretion of the court in overruling that motion.

After reading the bond in evidence, the defendant offered to prove that the testator of the plaintiff died before the termination of the suits therein mentioned, and that the same were still pending, to which the court refused permission, on the ground that it would constitute no defence to the action; and the court thereupon instructed the jury, that the effect of the default, was to admit the rendition of the services, leaving open for inquiry, the question of the amount due, which was nevertheless fixed by the agreement, whether the plaintiff's intestate conducted the business to a successful termination or not, or whether he lived to have it determined one way or the other; and that the plaintiffs were entitled to interest on the money payable under the contract from the time they could find it was vexatiously withheld.

As the giving of these instructions was objected and excepted to, and as after refusing to set aside the default they became decisive of the whole case, it is deemed unnecessary to copy or remark upon the antagonistic ones offered by the counsel for the defendants. Supposing, also, that the judge's declension to set aside the default was strengthened, if not prejudiced, somewhat upon the legal perception and conclusion, that the grounds then intimated and now relied upon, could not change the legal finding of the jury, under the instructions subsequently

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given them, nothing *practically* favorable to the defendant could have been gained by more fully opening the case as prayed for. If the instructions were correct, as we think they were, nothing of course but additional *credits*, which are not pretended to either in the affidavit or the motion, could have produced a finding materially different from the one complained of, for if the damages be excessive at all, they are only so in so trifling a miscalculation of the interest as to disentitle them to be here complained of.

No sufficient reason is perceived, upon which that portion of the paper relied upon in this suit acknowledging an indebtedness of \$500 "absolutely" in contract with another sum which was to be paid *conditionally*, can be regarded or dealt with as falling in any respect below the grade and dignity of an ordinary specialty, absolute under the common law. To the objection that "no time of payment was fixed," the answer readily suggests itself that it was due from the moment of its execution; the law inferring such to have been the understanding and the purpose of the parties. Had it been otherwise intended by the parties, no other legal inference can be entertained, than that they would have so expressed it, so that if the corporation has really subjected itself to the payment of the money earlier, or otherwise than it intended to do, (putting in the shape of a retainer what was not so designed) its own inconsideration or want of discrimination has been the cause of it. It is not pretended that the person who executed the bond had not the authority to bind the corporation as he did; the argument, or rather the intimation, that because a corporation can *only* be bound by *its* seal, its sealed obligation is therefore to be treated differently from other and similar specialties, being regarded as rather the result of professional zeal than professional reflection. 15 Wend. 256.

Upon the whole case, therefore, as neither the discretion of the court below upon the motion to set aside the interlocutory judgment, its subsequent instructions to the jury, nor its final refusal to arrest the judgment which was entered upon their finding, seem to justify or require the interposition of this court, the judgment of the court of common pleas is in all things affirmed.

Cathcart vs. Foulke & Sons.

ROBERT CATHCART vs. JOSEPH FOULKE AND SONS.

1. The owner of a slave instituted a suit against the plaintiffs as part owner of a steamboat, and recovered damages against him for the loss of his slave while upon the boat employed as cook. Plaintiff now sues defendants as joint owners with him at the time of the loss for an amount of the judgment against him equal to their interest in the boat. Held, that to entitle him to recover, it devolves upon him to make out in this case a state of facts which would entitle the owner of the slave in the first instance to a judgment against the owners of the boat.
2. Defendants purchased plaintiff's interest in a steamboat, and agreed with him amongst other things "to pay all the claims against said boat, and hold (plaintiff) harmless from all such claims." Held, that the claims alluded to are only the debts and liabilities due by the boat, by virtue of her contracts, and not mere rights of action against the officers or owners thereof for supposed neglect of duty as bailees.

APPEAL from St. Louis Court of Common Pleas.

LESLIE & LORD, for appellant.

A claim of this character is clearly action-able against the boat by name if brought within six months after the right of action accrues. And omission so to do only affects the remedy, and the rights of Cathcart under his indemnity would not be affected. R. Statutes, p. 181.

It is not pretended that Cathcart had any more personal agency, in the loss of the negro, than Foulke and sons had, and if the loss had happened through the negligence of Capt. Field, to whom is entrusted the command of the boat, Foulke and sons would, in connection with Cathcart as owners of the boat have been liable in case to the owner of the negro; and consequently if Cathcart by suit was compelled to pay, he is entitled in law to contribution independent of the contract and a legal deduction, has a right to full indemnity by the letter and spirit of the covenant of the defendants contained in the said bill of sale. 12 Eng. Com. Law R. 198.

The suit for the recovery of the damages for the loss of the negro, was commenced against the owners of the boat before the statute of limitations under the boat and vessel law had run.

The plaintiff in the suit for the loss of the negro having elected to sue the owners does not change the rights of this plaintiff, he had no control of the remedy which was concurrent vs. the boat by name or the owners.

What one partner voluntarily pays in good faith on a claim against the firm is properly chargeable to the firm and may after dissolution be recovered by way of contribution. The money paid by Cathcart for the loss of the negro was paid long after the dissolution, and therefore, a suit for contribution is the appropriate remedy. And it makes no difference whether the money so paid might have been avoided by defending a suit for it so that it was done in good faith.

It is contended that the two suits referred to in the record, the one at law and the one in chancery have conclusively adjudicated the right to recover for the loss of the negro against all the owners of the boat. This judgment at law though by default is the same as if not by default. It also appears from the case at law and chancery that the judgment being rendered by default was no fault of Cathcart in point of fact.

TODD & KRAM, for appellees.

First. The defendants are not liable on their agreement between them and the plaintiff dated March 25th, 1844, set forth in the record. That agreement provides that the defendants are, "to pay all the claims against said boat, and hold the said Cathcart harmless from all such claims."

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It is manifest from the language used by the parties, considered in connection with the subject matter of the contract, that they intended to embrace in the term claims such as were liens and incumbrances upon said boat, and nothing more. Sec. 35 of the act in relation to boats and vessels.

The contract must be so interpreted as to give effect to the intention of the parties as far as it is legally and mutually understood. *Verba intentioni non e contra debent inservire*. Story on Cont. page 149.

The claim of Matson for the loss of the negro was not a lien against the boat, nor could the boat have been sued therefor by name under the act concerning boats and vessels.

Second : The plaintiff and defendants cannot be regarded as copartners—they were merely joint owners of a carrying vessel, and their rights and liabilities must be settled by the law regulating and governing such joint owners. Abbot on Shipping, 97; 3 Kent, 154; Story on Part. 456; 7 Conn. Rep. 95

Third : The plaintiff cannot maintain his action upon the facts agreed, against the defendants for contribution. 1st. Because before the plaintiff can recover by way of contribution, it devolves on him to show that he and the defendants were jointly liable for the loss of the negro. 2d. In this suit he takes the place of Matson, and must show the liability of the defendants (himself, Cathcart included) to Matson. 3d. The judgment and proceedings in the case of Matson vs. Cathcart, does not establish any such liability. 4th. The judgments and proceedings in that case are not evidence against these defendants—they are neither parties nor privies thereto, and consequently not concluded by the proceedings in that case. 14 J. R. 318; 2 Greenleaf, § 116.

Fourth : From the facts it is apparent that the loss of the negro was purely accidental—the act of God; therefore there was no liability incurred for his loss by the parties who employed the negro, or by the joint owners of the boat. 13 J. R. 211; 1 Cow. 109; 2 Esp. 527; 15 Mass. Rep. 521.

Fifth : It is apparent from all the facts in the case that the plaintiff had judgment against him—not by reason of any legal or equitable liability to the owner of the negro, but by reason of the neglect of the plaintiff. This is shown by the record in the case of Matson vs. Cathcart; 13 Pick. 484.

Sixth : To maintain an action for contribution, a joint and equal liability for the debt to which the defendant is called to contribute must be established.

Seventh : An action for contribution cannot be maintained between joint wrong doers. 8 T. R. 186; 1 Vesey & B. 114, 118.

Eighth : One partner cannot maintain an action at law against another until the whole partnership business is reduced to a single debt. 13 Pick. Rep. 484.

RYLAND, Judge, delivered the opinion of the court.

This case comes before this court by appeal from the St. Louis court of common pleas.

The parties below submitted the case to the determination of the court of common pleas, upon an agreed statement of facts, and that court found for the defendants.

The plaintiff moved for a new trial, which being denied him, he brings the case to this court.

It appears that the facts embodied in this case, have in some measure been twice in this court before. Matson sued Field & Cathcart, the

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present plaintiffs, to recover the value of a negro, which had been hired to them and which was lost. In this suit judgment was rendered in favor of Matson by default at September term, 1843, and which was perfected by final judgment on 4th April, 1844. Field & Cathcart moved to set aside this judgment, which motion was overruled, and they appealed to this court, where the judgment below was affirmed. See 8th Mo. Reports, 686. Field & Cathcart then filed their bill in chancery in the circuit court of St. Louis county, praying to have this judgment of Matson against them enjoined perpetually. The circuit court granted the prayer of this bill, enjoined the judgment, and Matson appealed to this court, which reversed the decree of the circuit court and dismissed the bill. See 10 Mo. Rep. 100. Cathcart being compelled to pay Matson, brings this present suit against Foulke and sons for contribution.

The following is the agreed statements, viz : On or about the tenth day of September, in the year 1842, the said defendants were copartners in trade and doing business in the city of New York, in the State of New York, under the name, style and firm of Joseph Foulke and sons. On or about the day and year last aforesaid, the said defendants were the owners of a steamboat called the "Louisa," her tackle, apparel and furniture; which boat was used in navigating the waters of the Mississippi river and its tributaries. On or about the 20th day of September, 1842, the said defendants sold and conveyed one undivided fourth of the said steamboat, her tackle, apparel and furniture, to one Spencer Field, who afterwards, but before the hiring of the negro man hereinafter mentioned, sold two-thirds of his said one-fourth of the said steamboat, her tackle, apparel and furniture, to Robert Cathcart, the said plaintiff. While the said boat, her tackle, apparel and furniture was thus jointly owned as above mentioned by the said plaintiff, the said defendants and the said Spencer Field, the said Field was entrusted by the said joint owners with the conduct and management of the said boat in the carrying trade and lawful navigation of the said Mississippi river and its tributaries, the said Field acting as captain, and the said plaintiff as engineer on said boat. While the said plaintiff, the said defendants, and the said Spencer Field, were each joint owners as above mentioned, and while the said Field and the said plaintiff were acting, the former as captain and the latter as engineer as aforesaid, on said boat, the said Spencer Field contracted with one James Matson, trustee of Eliza P. Grimes and her heirs, for the hire and service of a negro man called "Henry," as a cook upon the said boat, and the said negro man went upon the said boat and served in the capacity of cook, and while thus employed he fell through a hole in the

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floor of the cook room of said boat into the Mississippi river and was drowned. Afterwards, and at the September term, 1843, of the St. Louis court of common pleas, the said James Matson, trustee as aforesaid, instituted a suit at law in form of an action of trespass on the case in the said court against the said Robert Cathcart and Spencer Field, as part owners of said steamboat, to recover damages, &c., for the loss of the said negro, the declaration and the record of proceedings in the said action, it is agreed shall be considered as a part of this statement. After final judgment was rendered in the said suit against the said plaintiff and Field, as stated in said record, they prayed an appeal therefrom to the supreme court of the State of Missouri, where the said judgment was affirmed, and after the said judgment was affirmed as aforesaid, the said Cathcart & Field, at the April term, A. D. 1845, of the St. Louis circuit court, filed their bill in equity against the said James Matson, trustee as aforesaid, praying relief against the said judgment, &c., which bill, and the record of the proceedings in the said equity cause, it is agreed shall be considered as a part of this statement. After the passing of the decree in the said equity cause, the said Matson appealed therefrom to the said supreme court, by which last mentioned court said decree was reversed, and the said bill dismissed. Afterwards, on or about the 18th day of September, 1847, the said Robert Cathcart was coerced by virtue of an execution issued on the said judgment in the said court of common pleas to pay and satisfy the same, and the said Cathcart on or about the day and year last aforesaid, did pay and satisfy said execution, amounting to the sum of \$766,01, being the amount of said judgment, interests and costs, which amount, with the sum of \$864 previously paid by said Cathcart for costs accruing in the supreme court, make the sum of \$774,65, which the said Cathcart has paid by reason of the said action of trespass on the case.

It is further agreed, that at the time of commencement of the said action of trespass on the case against said Cathcart & Field, the said Field was generally reported to be insolvent, and ever since hath been and is now so reputed.

The said Joseph Foulke and sons, the said defendants in this suit, were not at any time personally notified or informed by the said Cathcart & Field, or by either of them, of the institution or pendency of the said action of trespass on the case, nor were the said Joseph Foulke and sons (the defendants herein) at any time personally notified or requested by the said Cathcart & Field, or by either of them, to defend or aid, or assist in the defence of the said action. Nor had the said Joseph Foulke and sons (the said defendants herein) any agency or di-

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rection whatever in the bringing or conducting of the said equity cause above mentioned at the time the said Cathcart & Field, and the said Joseph Foulke and sons were joint owners of the said steamboat as aforesaid, and also at the time of the institution of the said action of trespass on the case, the said Joseph Foulke and sons (who resided, and ever since have resided in the city and State of New York,) were owners of property situate in the city of St. Louis, and with a view to its management and protection, they employed W. W. Thompson & Co., (which firm was composed of W. W. Thompson and Edward H. Dix, and both of whom then resided in the city of St. Louis) to act as agents of the said Joseph Foulke and sons, for the purpose of managing and protecting their said property situated in the said city of St. Louis, including their interest in the said steamboat "Louisa." But the said Thompson & Dix were not the agents of the said Joseph Foulke and sons, nor authorized by them to act for them in respect to any other matter, nor for any other purpose than as above stated.

It is admitted that soon after interlocutory judgment was rendered against said Cathcart and Field in the said action of trespass on the case the said Cathcart informed the said Edward H. Dix of the pendency of the said suit, but the said Thompson and Dix were not, nor were either of them at any time notified or requested, as the agents of the said Joseph Foulke & Sons, to defend or assist in the defence of said action, nor were the said Thompson & Dix, or either of them, at any time requested by said Cathcart and Field, or either of them, to notify said Foulke & Sons of the pendency of the said action against said Cathcart & Field, nor did the said Thompson & Dix, or either of them, at any time inform the said Joseph Foulke & Sons of the pendency of said suit.

It is further agreed that on the 25th day of March, 1814, the said Cathcart sold and conveyed all his right, title and interest in the said boat, her tackle, apparel and furniture, to Joseph Foulke & Sons, (the defendants herein) which sale is evidenced by an instrument of writing duly executed by authority of the said Joseph Foulke & Sons, and which writing it is agreed shall be taken and considered as a part of this statement, and is in the words and figures following.

"Know all men by these presents, that I, Robert Cathcart, of the city of St. Louis, State of Missouri, for and in consideration of the sum of five-hundred dollars, to me in hand paid by Messrs. Joseph Foulke & Sons, of the city and State of New York, the receipt of which is hereby acknowledged, have granted, bargained, sold, confirmed and delivered, and by these presents do grant, bargain, sell, confirm and deliver

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unto the said Joseph Foulke and Sons, and their heirs and assigns forever, the one undivided sixth part of the steamboat "Louisa," her engine, tackle, apparel and furniture, as she now lies at the wharf in the city of St. Louis, subject to all liens and encumbrances against said boat. It being understood that the said Joseph Foulke & Sons are hereby fully authorized to collect all claims due or owing to said boat, and the same when collected to appropriate to their own proper use and benefit, and it is also understood and agreed that the said purchasers are to pay all the claims against said boat, and hold the said Cathcart harmless from all such claims.

"In witness whereof the said Robert Cathcart, in his own proper person, and the said purchasers, by their agent, Alexander Hamilton, of St. Louis, Missouri, have hereunto set their hands and seals, this, the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and forty-four. Executed in duplicate.

ROBERT CATHCART, [SEAL.]

JOSEPH FOULKE & SONS, [SEAL.]

By Att'y A. HAMILTON."

It is further agreed that the said Spencer Field also sold and conveyed all his interest and property in the said boat, her tackle, apparel and furniture to the said Joseph Foulke & Sons, which sale of the interest of the said Field last mentioned, was made sometime after the institution of the said action of trespass on the case, and after judgment had been rendered therein, but before the said sale by the said Cathcart above mentioned.

Now it is stipulated and agreed by the parties to the above entitled cause that the foregoing statement of facts may be submitted to the said court of common pleas as an agreed case, and if the said court upon the facts aforesaid shall be of opinion that the said plaintiff is entitled to recover against the said defendants for the said sum of money paid by said plaintiff under said execution above mentioned, or any part thereof, then and in such case it is agreed that the judgment shall be entered herein against the said defendants for such amount as the said court upon the facts aforesaid, shall determine they are liable for, together with the costs of this proceeding, to be taxed, &c.; but if the said court, upon the facts aforesaid, shall be of opinion that said plaintiff is not entitled to recover the said sum, or any part thereof, against said defendants then and in such case judgment shall be rendered herein against said plaintiff for costs, &c. And it is further agreed, that either party may, after final judgment herein, prosecute an appeal or writ of error to the

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supreme court, and this agreement shall not be construed into a release of errors, &c.

From the above statement, it is plain that the grounds upon which the plaintiff in error relies for a reversal of the judgment are but two :

First, The liability of the defendants in error as part owners of the steamboat, to make contribution of a portion of the damages recovered by Matson against Cathcart and Field, for the loss of the negro man, while in the employment of the owners of the boat.

Second, Their liability under the contract of sale and covenant therein by Foulke & Sons "to pay all the claims against said boat, and hold the said Cathcart harmless from all such claims."

These points embrace the whole case, either one of which being for the plaintiff in error will require a reversal of the judgment of the court below.

Let us examine these points.

First, The liability as part owners. The facts as agreed in this case, leave no doubt in our minds that Foulke & Sons had no notice of the pendency of the suit of Matson vs. Cathcart and Field. There is nothing shewing us that they were privy to said suit. They are not parties on the record. They are not therefore concluded by the said judgment against Cathcart and Field.

In order, then, to force them to contribute a portion of the damages thus recovered against Cathcart and Field, as part owners of the steam boat, for the said loss, it becomes necessary in this action for the plaintiff to make out such a state of facts as would justify the court in the first instance in finding for the owner of the negro against the hirers, that is, against the owners of the boat. In this agreed statement, there is not sufficient proof, in our opinion to warrant or authorize such a finding, and if Cathcart and Field had made proper defence to the action brought against them by Matson, in all probability there would have been no cause ever to have called on Foulke & Sons for contribution.

The negro man lost is said to have fallen through a hole in the cook-house of the boat into the Mississippi and drowned. It may have been a mere accident, a casualty, happening without any blame or neglect on the part of the owners of the boat. We are unable to say, from all that appears in this case, that the owners of the boat were ever liable for the loss of the negro. There is nothing in this first point, therefore, requiring our interference.

Whether the claim of the owner of the negro man, for his loss is properly such an one as is included in the contract, between Cathcart and

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Foulke & Sons, above set out, or not, is the last and only remaining point for our consideration.

If we are to construe this contract, as it was most probably understood and intended at the time of its making by the contracting parties, there will be but little trouble, in our opinion, in coming to the conclusion that such a claim as the one in controversy was never thought of by them; and is not embraced in the said contract.

The claims alluded to, (in our opinion) are such as are liens against the boat, debts due by the boat, or liabilities the boat may be under by virtue of her contracts; not the mere right of action which a party may imagine he has against the owners of the boat, for a supposed neglect of duty, creating a supposed liability on their part as bailees; debts or demands or claims against the boats were meant, and not mere rights of action against the officers or owners thereof.

We entertain the opinion that Cathcart himself never considered the demand for which Matson had brought suit against him, as one properly against the boat, or as one calculated to cause him any trouble or uneasiness. He never pretended to give Foulke & Sons, though they had agents in St. Louis, any notice of the suit. No steps were taken by him to inform them or to request them to assist in the defence of a suit brought by a person demanding damages for the accidental drowning of a negro hired as cook on the boat of which he and they were owners.

This may be a hard case on the part of Cathcart: he has been made to pay a large sum of money, which in all probability he would have avoided, had proper defence been made in time.

But this neglect to protect himself, gives him no just claim to contribution from the other part owners of the boat.

The hardship of this case, proceeds in part from the unbending rigor practiced by the inferior courts in overruling motions to set aside judgments by default; and the practice of this court heretofore of refusing to control the discretion of the inferior courts in such matters.

The practice of this court was designed to induce a liberal exercise of such discretionary powers on the part of the inferior courts; but it has failed of its intention, if we are to judge from the number of cases which come up to this court, involving only the exercise of such power.

The judgment below must be affirmed.

Winston vs. Wales.

JOSEPH WINSTON vs. DEXTER T. WALES.

Where evidence has been given, upon which a jury might find a verdict, its sufficiency should be submitted for the determination of the jury, and if it be excluded by the court it is error.

APPEAL from St. Louis Court of Common Pleas.

MOREHEAD, for appellant.

1. It is contended that the defendant is liable to the plaintiff in the sum of \$500, paid at Louisville for the boat, the boat proving unseaworthy and being taken back.

2. The defendant is liable for damages on account of breach of contract in the sale of 1-4 of the boat to plaintiff after his purchase from Fine. In support of the last point see the case of Byrd vs Fox, 8 Mo. Rep. 574.

The instruction of the court below was in error,

1st. Because the jury had the right to judge as to the testimony for themselves, and were forced by the instruction to find against the plaintiff.

2. Because there was evidence to charge the defendant.

The evidence in the last point is, That Fine made a bill of sale to the defendant for the boat, and delivered him the possession and defendant then agreed to sell plaintiff 1-4 of the boat, and make him clerk of the boat for \$1125—\$700 of which was paid. This agreement was broken; he refused to comply and sold the boat.

It is insisted that the defendant is liable on this breach of contract and that the instruction was wrong in disregarding it.

KNOX & WHITE, for appellee.

1st There was no evidence in the case that the defendant was owner of the steamboat Clermont on or before the 29th day of April, 1846, but there was positive evidence that he was not the owner of said boat, nor had defendant any interest in said boat at the time the five hundred dollars was paid by Winston to Beckwith. It further appears affirmatively that said Beckwith was the owner of the boat at the time the money was paid, and that the same was paid to Beckwith for his own use.

2. There is no legal evidence that Winston ever rendered services on said boat as clerk or otherwise after Wales became the owner.

3. The only pretended evidence to prove that Winston ever paid money on account of said boat, is a statement made by Winston to Wales in Fine's deposition, to the competency of which defendant's counsel excepted. This statement by the plaintiff of a fact within his own knowledge, and not from the nature of the transaction within the knowledge of the defendant, we submit is not evidence of the truth of the fact stated.

4th. If the plaintiff did expend money on said boat after the contract for the purchase made between Fine and Beckwith, and before the boat was delivered to Wales, and before said contract was rescinded, the defendant is not liable for such expenditures, as they were made for the benefit of Winston and Fine, and not for the benefit of Wales.

Judge BRACH delivered the opinion of the court.

In the latter part of April, 1846, the defendant, then in St. Louis,

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having heard from one Fine that he was going to Cincinnati to purchase a steamboat for the Missouri river trade, shewed him a letter from Captain Beckwith of Louisville, stating the size and capacity of a certain boat called the Clermont, which boat Beckwith wished the defendant to come on to Louisville and take possession of. Defendant thereupon asked Fine if that boat would suit him for the Missouri trade, to which Fine replied he thought not, but that on his way to Cincinnati, he would stop at Louisville and examine her. Defendant thereupon wrote by Fine to Beckwith, that any contract he might make with Fine, respecting price and payment, would be satisfactory to him (defendant.) Fine proceeded to Louisville, examined the boat, and agreed to take her at the price of four thousand five hundred dollars—Beckwith agreeing to do certain repairs, which he executed accordingly. Beckwith required five hundred dollars to be paid to him in cash, which was paid by Winston, who was present, and was one of the company who had projected and agreed upon the purchase of a boat at Cincinnati for the purpose already stated. This contract appears to have been consummated or ratified on the 4th day of May, 1846, at which time the defendant had reached Louisville, for although the testimony represents him as complaining that Beckwith had sold the boat too cheap, it seems that he executed an agreement of which the following is a copy:

"This agreement made this 4th day of May, 1846, between Elisha Fine and Dexter T. Wales, all of St. Louis, Missouri, sheweth that said Fine hath bought of Dexter T. Wales a certain steamboat Clermont, with all her tackle, furniture, &c., and has already paid five hundred dollars in cash on the same, and when a certain acceptance for \$1000, dated at Louisville, May 4, at ten days, is paid, and the said Fine, on his arrival at St. Louis, gives the said Wales two good endorsed notes, at 3 and 6 months, for \$1500 each, then the said Wales binds himself to give the said Fine a clear bill of sale of said steamboat Clermont and everything belonging to her.

Dated at Louisville, May 4, '46.

ELISHA FINE, [SEAL.]
DEXTER T. WALES, [SEAL.]

Witness, JOSEPH WINSTON."

It cannot be doubted, nor is it pretended, but that the five hundred dollars herein acknowledged to be paid on the purchase from Wales, was the same which was paid by Winston a few days previously, as shown by a receipt therefor in these words:

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"*Louisville, April 29, 1846.* Rec'd of Joseph Winston five hundred dollars in part pay for purchase of steamboat Clermont, as per contract.
JACOB BECKWITH."

Thus far it seems that Beckwith had, in some manner come into possession of a boat belonging to Wales, which he wished to surrender to him, but which Wales authorized him to sell to Fine, one of the associates of Winston for the purchase of a boat at Cincinnati, and which was sold to him accordingly. It also appears that Winston paid to Beckwith, as the supposed and indeed *accredited* agent of Wales, five hundred dollars on the purchase of the boat, that Wales was made acquainted with the fact and ratified it by acknowledging its receipt in a conditional bill of sale which he executed a few days afterwards. It is true, that notwithstanding all this, Captain Beckwith testifies that at the time he received the money from Winston the boat was his—but as this testimony is in apparent conflict with all the other facts and circumstances which have been spread upon the record, and upon which Winston and his associates had a right to rely, and upon which, under the express preliminary authority and guaranty of Wales, they had a right to act and apparently did act, we perceive no propriety, in such a suit as this, in permitting the defendant to interpose the testimony of his *agent* to stultify *himself*. For all the purposes necessary here to consider, the question is not whether Beckwith or Wales actually *owned* the boat, but as whose property did Wales induce Fine and Winston to examine and purchase her? It would seem that there could scarce be a contrariety of opinion when looking to the testimony upon that subject; and as the contract which was made between Wales and Fine was, a few days afterwards rescinded under such circumstances, and such an agreement as to Winston, as to entitle him to his present action, defensible only to the extent of such loss (if any) as it could be shewn he ought to bear on a resale of the property, it would seem that the judge below committed manifest error in instructing the jury that "there was no evidence before them to charge the defendant in this action." But for that instruction, the jury might very well have found that this, and other sums about which there was also some testimony, was money had and received, or paid for the use of the defendant. At all events, the question should have been left to the jury.

There is, however, an additional point of view, connected somewhat with the foregoing, which renders the instruction we are considering even more palpably erroneous. The contract, as has been already intimated, was rescinded, by its being agreed (after it was ascertained and decided by the inspectors that the boat was not strong enough for the

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Missouri trade) that Wales should take her back, do the best he could with her, and that Winston and Fine would bear an equal proportion in any loss that might be sustained, either in running her or making sale of her—he (Wales) *rendering a correct and satisfactory account to Fine and Winston*. The boat being thereupon delivered to Wales, he proposed to Winston that as he had already paid the five hundred dollars alluded to, and (as Winston alleged) some two hundred dollars besides in the way of expenses, &c., he should retain an interest of one-fourth in the boat, and go upon her as clerk. Winston agreed to this, but when the witness returned from the Missouri eight or ten days afterwards, he found the boat laid up, and Wales objecting to receive Winston as clerk on the alleged ground that he was incompetent as a book-keeper. The boat was then taken charge of and run by Wales' brother, until winter, when she was sold.

Here Wales is again seen acknowledging the claim or interest of Winston (then amounting to some \$700) and after agreeing, in recognition of it, to transfer him an interest in the boat, which should entitle him to a share in the profits and a clerkship besides, the next and the last that is shewn by the record, is his repudiation of that agreement, and the transfer of the boat, firstly to his brother, and finally to others, without rendering either to Fine or Winston a syllable of explanation, much less "the correct and satisfactory account" to which he had pledged himself. Unless all these circumstances can be made to wear a different aspect, it ought surely to be left to a jury to measure the damages of a citizen thus unjustly dealt by.

The judgment of the court of common pleas is therefore reversed, and the cause remanded.

GEORGE D. LITTLE vs. STETTMEIER & BROTHER.

Defendant employed an agent to sell for him a stock of goods in the city of St. Louis; to facilitate the sale, the agent purchased from the plaintiffs and others, additional goods "in his own name;" defendant afterwards knew of the purchases and sanctioned them by his consent. Held that he is liable for the purchases thus made.

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APPEAL from St. Louis Court of Common Pleas.

KNOX & KELLOG, for appellants.

The court erred in deciding that the plaintiff was liable to the defendants as co-partner with Irvin. To constitute a co-partnership there must be a liability to share both profits and losses, of which there is not the slightest evidence in this case. 1 Wend., 463, *Compton vs. McNair*; Story on Partnerships, sec. 30, page 46; 14 Pickering, 192; *Turner vs. Bissell*, 2d Greenleaf's evidence, 394, 395, 396.

Irvin was never authorized to make any purchase for him and the evidence shows that the goods were sold to Irvin on his own credit. There is no evidence that Little ever acknowledged any such authority or paid for any such purchase.

The evidence shows that at the time the agreement between Little and Irvin was entered into it was contemplated by the parties that additional goods were to be added to the stock by said Little (who it appears was a wholesale dealer,) and Little was to be allowed the usual per centum charged by wholesale dealers for such additional stock.

Under said agreement between Little and Irvin there was no power given to him to purchase except of Little. It was however, contemplated that Irvin might subsequently purchase said stock, and therefore Little was under no obligation, nor had he any right to prohibit Irvin purchasing goods from other persons on his own account.

The fact that Little subsequently took possession of the goods in the store kept by Irvin as his own or sold them to pay Irvin's indebtedness to him, cannot affect his liability in this suit. If he took said goods wrongfully, then he is liable to Irvin for such wrongful taking. Nor does the fact that some of the goods taken by Little were purchased by Irvin of the defendants affect Little's liability in the present action. If the goods taken belonged to Irvin then Little is liable to him as a trespasser but he is not liable to Irvin's creditors.

The plaintiff submits that he is no more liable for goods purchased by Irvin while carrying on business under the aforesaid agreement than he would have been if he had had a mortgage on all goods in Irvin's store or that might be added to said stock, to secure Irvin's indebtedness to him. Little claimed the goods as security for the payment of \$6717 4 on the payment of which by Irvin he was to become the owner of said stock.

KIRTLEY, for appellee.

1. The court of common pleas committed no error in overruling the instructions asked by appellant on the hearing.

2. The finding and judgment of the court was right on the agreed facts as made by the parties.

3. The court committed no error in overruling the motion for a new trial. 3 Mo. R., 496; *Ruggles vs. Washington county*, 7 Mo. R., 318; 16 Johns. R., 34, *Dob vs. Halsen*; 6 S. & R. 333, *Gill vs. Hohn*.

RELAND, Judge, delivered the opinion of the court.

This was an action originally brought before a justice of the peace by plaintiffs against the defendant Little. The plaintiffs obtained judgment, the defendant appealed to the court of common pleas, where the

plaintiffs again had judgment—from which last judgment, the defendant appealed to this court.

The following agreed case was submitted to the court of common pleas.

"This was an action brought by plaintiffs, against defendant for the recovery of \$63 91, the balance on an account of \$118 91 for goods, wares and merchandize furnished and sold by said plaintiffs to David M. Irvin, who it was proven had been, from about the 9th day of November, 1846, carrying on a retail store in the dry goods line, on 4th street, in the city of St. Louis, until about the 9th of March, 1848. That during that time Irvin had from time to time purchased on a short credit and partial payments several bills of goods from the plaintiffs as set out in the account filed as the foundation of the action in this case. That previous to Irvin's commencing business on the 9th November, 1846, he and Little entered into the agreement, which is here inserted—that under this contract Irvin commenced and carried on the business in his own name with the original stock of goods furnished him under said contract, kept up, and added to by the purchases made from plaintiffs as shown by the said account, and similar purchases made by said Irvin from E. M. Sell & Co., and others in Saint Louis, and by goods furnished by Little from time to time under the contract. That during said business, said Little resided in, and carried on the mercantile business as wholesale dealer in Saint Louis, and was frequently in the store-house managed by said Irvin, looking after his interest therein, and his contract with said Irvin—that about the 9th of March, 1848, said Little became dissatisfied with said Irvin's management, and on the morning of the 9th March, 1848, before Irvin came to the store on 4th street, so carried on by him, Little came with hands and cars, to said store, took out and hauled off the stock of goods therein and had the same sold at auction for his own use and benefit. That among this stock, were the articles furnished and sold to Irvin by the plaintiffs on the 8th of March 1848, in the packages and parcels as received by Irvin of the plaintiffs.

It was also found and admitted that the several bills of goods in plaintiffs account specified, were charged by plaintiffs at the regular and usual prices on their books, to and in the name of said Irvin, and not George D. Little.

It was further proved and admitted, that at the time these goods were so taken by Little, Irvin was indebted to him in a much greater amount than those goods were worth—and the question now submitted is under the agreed state of facts—can the plaintiffs recover in this action the said balance of \$63 91 of said defendant Little, or are they by law only entitled to look to said Irvin for payment thereof."

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The article of agreement is as follows: "These articles of agreement made and entered into by and between George D. Little and David M. Irvin, both of the city and county of St. Louis, and State of Missouri, witnesseth that whereas the said George D. Little did on the 9th day of November, 1846, for and in consideration of the covenants and agreements hereinafter contained, make, constitute and appoint the said David M. Irvin, his true lawful agent, for him and in his name to take possession of the store No. 54, Fourth street in the city aforesaid, then and before accupied by one Charles A. F. Fessenden, and of the goods and merchandize in said store, by him, the said Little at that date purchased of the said Fessenden, and for him the said Irvin to sell and dispose of the said goods and merchandize and other goods and other merchandize, that thereafter might be added to said stock in said store or any other to which said goods may be removed and to account to, and with him the said Little for the proceeds of said sales — and it is further understood and agreed by and between the said parties, that the said Irvin shall receive for his compensation for selling the said goods, and managing and conducting the business aforesaid, such amount as may be received from the sale of said goods after allowing and paying over to the said Little the costs of the original stock, the costs and usual per centum charged by wholesale merchants on the additions of goods made to said stock, and after paying all expenses, such as rent for the store, clerk hire, &c., incident to sale of said goods—and it is further understood and agreed by and between the parties hereto, that if at any time, the said Irvin shall pay or cause to be paid to the said Little the sum of six thousand seven hundred and seventeen dollars and four cents, that being the original costs of said goods, at the date of this agreement, to wit, on the 9th of November, eighteen hundred and forty-six, and such further or other sums as may be due the said Little for additional goods that may have been added to the said stock, as aforesaid, then and in that case the said Little covenants and agrees to give the said Irvin a full and absolute bill of sale of all the goods in said store or other as the case may be at the time of such payment as aforesaid, and in case of the death of said Little, it is further covenanted and agreed, if within three months after the said death, the said Irvin shall pay or cause to be paid the said sum or sums aforesaid, or any part thereof, that may then be due and unpaid, to the administrator or legal representatives of the said Little, that he or they shall make and execute to said Irvin such bill of sale as aforesaid; and the said David M. Irvin, in consideration of the premises and the compensation herein before specified, hereby covenants and agrees to and with the

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said George D. Little or his legal representatives, faithfully, fully and truly to account for all sales made of said goods and merchandize as aforesaid, and for the faithful performance of all the covenants herein before mentioned. In testimony whereof the said parties to this agreement, have for the purposes aforesaid, hereto affixed their hands and seals in duplicate." This article was signed and sealed by the parties.

The defendant upon this state of the facts in proof asked the court to declare the law to be as follows:

1st. The court is asked to decide that there is no evidence in this case to show that Little and Irvin were partners, or that Little was liable as partner for the goods purchased of the plaintiff.

2d. That there is no evidence in this case to show that D. M. Irvin had authority as agent of Little to purchase the goods for which this suit is brought.

3d. That by the contract between the defendant and Irvin offered in evidence, the said Irvin was not authorized to purchase goods for said Little

These instructions were refused and the defendant excepted. The court found for the plaintiff. The defendant moved for a new trial, which was refused and excepted to, and the defendant then brought the case to this court by appeal.

From the facts disclosed by the agreed case, I entertain no doubt of the correctness of the decision of the lower court. David M. Irvin was the agent of Little in selling the goods, and no doubt was the agent in making purchases of additional goods from the plaintiffs, from E. M. Sell & co., and others, from time to time, in order to facilitate the sale of the original stock, bought by Little of Fessenden. The defendant was frequently at the store of Irvin or at his store, kept by his agent Irvin; was looking over the business; and watching the management of it by Irvin. He could not have been ignorant of the purchases made from time to time by Irvin from November, 1846, until 9th March, 1848, and by his consent sanctioned the acts of his agent. It is nothing more than justice that he shall be bound by these acts.

I find no fault in the court below in refusing the instructions asked for by defendant, nor in finding the verdict for the plaintiffs, from the facts before it. It therefore committed no error in overruling the defendant's motion for a new trial.

The judgment is affirmed.

Little vs. Sell & Co.—Steamboat Globe, Langstaff & Hulme vs. Herbert.

GEORGE D. LITTLE vs. EDWIN M. SELL & CO.

APPEAL from St. Louis Court of Common Pleas.

KNOX & KELLOGG, for appellant.

The court erred in deciding that the plaintiff was liable to the defendants as a co-partner with Irvin. To constitute a co-partnership there must be a liability to share both profits and losses, of which there is not the slightest evidence in this case. 1 Wendell, 463, Compton vs. McNair; Story on Partnership, sec. 30, page 46; Pickering, 192; Turner vs. Bissel, 2 Greenleaf's Evidence, 394, 395, 396.

The fact that Little subsequently took possession of the goods in the store kept by Irvin and sold them to pay Irvin's indebtedness to him, cannot affect his liability in this suit. If he took said goods wrongfully, then he is liable to Irvin for such wrongful taking. Nor does the fact, that some of the goods taken and sold by Little were purchased by Irvin of the defendants, affect Little's liability in the present action. If the goods taken belonged to Irvin, then Little is liable to him as a trespasser, but is not liable to Irvin's creditors.

The plaintiff submits that he is no more liable for goods purchased by Irvin while carrying on business under the aforesaid agreement, than he would have been if he had had a mortgage on all goods in Irvin's store, or that might be added to said stock to secure Irvin's indebtedness to him. Little claimed the goods as security for the payment of \$6717 04, on the payment of which by Irvin he was to become the owner of said stock.

RYLAND, Judge, delivered the opinion of the court.

The facts in this case are the same in every essential feature as those in the case of Stettheimer vs. Little.

The opinion of this court, therefore, in that case will suffice for this. The judgment of the court below is affirmed.

IN THE MATTER OF STEAMBOAT "GLOBE," LANGSTAFF & HULME vs.
C. W. HERBERT.

The claim of a clerk upon a boat for wages, is not a statutory lien upon the boat; it is only a personal demand against the owners.

STATEMENT OF THE CASE.

This steamboat was sold by order of court, and all the lien claims were paid off, leaving a nett surplus for distribution to the legal and proper claimants. Langstaff & Hulme, Philip Rock and Charles W. Herbert, severally filed claims against said surplus.

Steamboat Globe, Langstaff & Hulme vs. Herbert.

Langstaff & Hulme claimed all the surplus by virtue of a deed of trust, dated 18th October, 1849, for \$7,400 due from Ward. (the owner of the whole boat, except an interest of \$500 belonging to Rock,) to them for money advanced on the building of the boat, no part of which amount secured thereby, has been paid to them.

Herbert claimed by virtue of a promissory note as follows:

"On demand steamboat Globe and owner promise to pay Charles W. Herbert one hundred and twenty-four dollars, for value received of him, this the 20th day of October, A. D. 1849

D. WARD, Master."

And moved the court, out of the surplus, after payment of the statutory liens, to pay this claim, which motion was granted, after hearing the following evidence:

That the note was in the handwriting of Ward, the master; that Herbert had been clerk from June, 1849 at \$75 per month, that Ward had admitted he owed Herbert that amount as clerk's wages; and that after satisfying statutory liens, the surplus was enough to pay Herbert's claim.

Upon these facts Langstaff & Hulme asked the court to declare the law to be that Herbert was not entitled to any part of said surplus, and to award the whole of said surplus to them, as lawfully entitled thereto.

This instruction the court refused, and the said Langstaff & Hulme moved for a new trial, because the court refused proper and competent instructions, and because they erred in allowing Herbert's claim on the facts proved. The motion was overruled and an appeal taken.

CROCKETT & KASSON, for appellant.

There was error in permitting the clerk to pursue a claim against the proceeds of the boat. He has no lien by express statute (but to the contrary even) upon the boat; a "fortiori" upon its proceeds in conversion. The claim of Langstaff & Hulme ranked in the 2nd order. Revised Stat., "Boats and Vessels," sec. 1; Ward's note to Herbert did not bind the boat at all, § 30. It was simply the master's private promise to pay.

Langstaff & Hulme alone, of the parties before the court, had a debt which either by statute or by act of the parties was made a lien on the boat, and it was in both substance and form a debt of higher rank than either of the other claims.

The clerk tried to make a personal debt of the master good against the proceeds of property which once belonged to the master, and of course cannot do it against claims to which this very property was lawfully pledged. There is no warrant in the statute for any such proceedings.

NAPTON, J., delivered the opinion of the court.

After the payment of the liens upon this boat from the proceeds of its sale, there was still a surplus, and the question in this case was, whether the claim of Herbert, the clerk of the boat, should be paid out of the surplus.

The statute requires the surplus to be distributed among the creditors of the boat.

The clerk's wages are not a lien upon the boat under our act; on the contrary they are expressly excepted in the enumeration of liens. Rev. Code, 45, p. 181, sec. 2.

This claim can then be only a personal demand against the owners. We, therefore, are of opinion that the claim should not have been allowed. Judgment reversed and cause remanded.

Garrison (interpleader) vs. McAllister & Co.—Langstaff & Hulme vs. Rock.

GARRISON (INTERPLEADER) vs. McALLISTER & CO.

An interpleader cannot be entertained in a suit under the act "concerning boats and vessels."

APPEAL from St. Louis Court of Common Pleas.

CROCKETT & KASSON, for defendants.

Interpleader is a special process given by statute in certain cases of the attachment of the property of debtors, to abide final judgment. Rev. Stat., "Attachments," art. 1, secs. 39, 40.

This suit is under another statute—that regulating boats and vessels. Ch. 20, sec. 3, &c., 11, &c., in which no process of interpleader is allowed.

The process of interpleader is limited to proceedings under the attachment act, of which it is a part.

Judge BIRCH delivered the opinion of the court.

The only point in this case being whether an interplea can be entertained in a suit under the statute "concerning boats and vessels," and it being manifest from an examination of the statute that that remedy is not given, the judgment of the court of common pleas is affirmed.

LANGSTAFF & HULME vs. PHILIP ROCK.

Where the claim of a "part owner" against the boat, comes within the provisions of the first section of the act concerning "boats and vessels" it is a lien upon the boat as in case of other persons. The only restriction upon the part owner is that he is required to give notice in writing to all the other owners of his intention to commence his suit twenty days before the commencement of the action.

APPEAL from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

This was an agreed case submitted to the court in writing, by Philip Rock, D. Ward and Langstaff & Hulme with reservation of right of appeal.

The "Globe" was attached in this court for sundry lien claims, and the weapon sold by order

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and at the sale bought by Langstaff & Hulme for \$5000, and the money paid into court therefor. A surplus of that fund remains, after the payment of all the claims proved.

"Ward" owned all the boat at the time of the sale, except an interest of \$500, which then belonged to "Rock."

"Rock as part owner," on the 23d Nov. 1849, commenced suit against "Sb. Globe" to recover a demand of \$977 against the boat; which demand he claimed to have been based upon the following advances:

"\$500, To pay off officers and crew, and enable the boat to navigate the waters of this State, advanced 19th Sept. 1849; the wages being liens on boat. \$677, Advanced 1st Nov. 1849, for insurance on said boat, to enable her to navigate, &c., and equip, &c.

He averred that his demand accrued on account of D. Ward, the master and part owner of said boat, covering all but an interest of \$500; the boat being valued at \$12,000. Notice of intention to proceed against said boat given by "Rock to Ward," 1st Nov. 1849, taking notice of said two demands.

Process issued thereon, 23d November, 1849, but the boat could not be arrested, being then in possession of an officer under prior process from the same court: and the sheriff made his return accordingly.

It is admitted that the \$300, was advanced prior to the commencement of said suit to pay off wages of crew which were then lien claims against the boat. Also,

That Rock had then paid the two following notes. Dated Sept. 19, 1849, payable in sixty days at bank to Rock's order \$338 50 each, and signed by Ward, the consideration of which was insurance of said boat effected in Ward's name for whom it might concern, and \$500 being endorsed on one policy for Rock's benefit.

No part thereof has been repaid to Rock, by either the said boat, or said Ward.

A deed of trust is also admitted, executed and delivered by Ward to Langstaff & Hulme, (R. F. Sass, trustee) Oct. 18, 1849, to secure \$7125, money advanced for building said boat, evidenced by six notes payable to L. & H. The first dated, 17th April, 1849, at four months; the other five dated 23d, June, 1849, at 180, 270, 360, 450 and 540 days after date; with condition to pay each and all of said notes at maturity, and pay the first which had already matured. In case of failure to pay one note, all to be taken as immediately payable, being thereby prematured.

With usual power to sell for breach, and on notice, duly recorded 31st, October, 1849, at St. Louis.

Langstaff & Hulme, still hold the notes all of them remaining unpaid. Ward is insolvent and a non-resident of this State.

Has Rock a lien on said surplus?

Have Langstaff & Hulme a lien thereon superior to Rock's?

The court may order the distribution according to the rights of the parties.

At the time of the sale of the boat, Langstaff & Hulme agreed with Rock, that they would bid enough to cover all liens, including Rock's claim, with this understanding: Rock did not bid on her.

Charles W. Herbert also filed a claim upon said surplus in the same court.

At the hearing of said several claims, the court ordered the following distribution of said net surplus:

To Herbert, \$124.

To Rock, \$977.

To Langstaff & Hulme, 23/24ths of the balance.

To Rock, 1/24th of the balance as part owner.

Langstaff & Hulme, except to the order as to Rock, and as to Herbert, and move for a new trial, which motion is overruled. They claim that the court should have awarded, by law, the whole net surplus to them, excluding Rock's claim.

CROCKETT & KASSON, for appellants.

Langstaff & Hulme vs. Rock.

Rock, having simply paid debts for which as part owner, he was, at all events, liable, could only get a claim upon the boat by proper suit under the 36 § of the Statute prescribing remedies against "boats and vessels." That is the specific and only mode. This he delayed to do, until his attempt proved a nullity, the law having transferred the whole title at that time.

Not being therefore a creditor of the boat "in specie," he certainly could not be a creditor as against the proceeds in conversion.

His claim is wholly personal against his co-owners, except that he, as part owner, is entitled to 1.24th of the surplus after the payment of all the boat's proper debts; 1.24th part owner without a lien, is certainly not to be preferred to 2.24ths creditor with a lien.

Besides how can Rock claim against these proceeds, in any other capacity than that of part owner? His debt is not a lien; § 1 "Boats and vessels." And it is only such creditors that are authorized to receive in distribution. Sections 16 and 17, ib.

And see as to Rock's position here, the case of steamboat Raritan vs. McCloy, 10 Mo. Rep. 535.

Hudson, for appellee.

1. Under the act of our legislature concerning boats and vessels, Code 187, section 36, it is provided that one or more joint owners of any boat, may sue the boat for supplies furnished, money advanced, &c. If then it is admitted that Rock, the defendant in error had the right to attach the boat, he certainly had the right to hold under the same attachment the proceeds arising from the sale of the property attached; the seizure of the steamboat Globe by the defendant in error, gave him a lien upon the boat, that when a lien once attaches, it follows the proceeds arising from a sale. See Abbot on Shipping Ed. of 1846, page 185, note 1.

2. The Statute of this State makes it the duty of the courts to order a boat to be sold which has been attached and not released by some one giving bond. After the sale the courts are required to cause a notice to be published notifying all creditors to come in on a certain day fixed and prove up their claims against the boat. The defendant in error contends that the statute gives him a lien from the date of the institution of his suit, and the seizure of the boat; and the notice to "all creditors" having a lien embraced him with the other creditors. See Revised Code, 184, section 14 and 15.

The defendant was entitled to distribution under the general law governing attachments.

3. The law governing courts of admiralty prevail in this State, where our own statute is silent, 10 Mo. Rep. 612. If then the maritime law be applied in this case, it will be seen that the court of common pleas had no legal right or authority to take cognizance of the claim of plaintiffs in error as mortgagees, and that court did right in refusing the motion of the plaintiffs in error, requiring the court below to order the surplus proceeds to be paid to them. Gilpin's R. 183, ib. 549. Adm. Reps. 223.

4. That until the mortgagee of a boat takes possession the mortgagor is owner to all the world. See Smith's Mercantile law, last ed. 179, note Abbot on Shipping 44.

5. It is contended that justice requires that our own citizens who make advances under such circumstances should be protected against foreign secret creditors and it is believed that it was the intention of the legislature to give protection to our own citizens.

6. Courts of admiralty have power to disprove of remnant's and surplussages. The master of a ship has no remedy *in rem* because he has no lien; but courts of admiralty will allow him payment for advances, &c., out of remnants and surplussages arising from the proceeds of the sale of the ship, because they partake of the nature of lien. Abbot on Shipping, 781, note 1.

7. The court of common pleas had jurisdiction in the matter of Rock against steamboat Globe, and the authority to distribute the surplus. 1 Peters Rep. 233; 2 Dana Ky. Rep. 482.

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NAPRON, J., delivered the opinion of the court.

Rock was part owner, and made sundry advances for the use of the boat which by virtue of the 36th section of our act concerning boats and vessels, authorized him to sue the boat. When the writ was served, the boat was already in the custody of the law, having been seized by a constable under a previous warrant from a justice.

After a sale of the boat, and a purchase by Langstaff and Hulme, who had a mortgage upon it, the question was whether Rock's advances should come out of the proceeds.

It must be admitted that there is some obscurity in the statute, in relation to the claims of part owners, but upon a careful examination of all its provisions, we have concluded, that part owners are not deprived of the same security which ordinary creditors have in relation to such advances as come within the four provisions of the first section of the act. The 36th section was designed to restrict this privilege, so far as to compel part owners when they intended to act in the character of creditors, to give twenty days notice to the other owners of the boat. When that section speaks of the causes of action, which may warrant part owners in suing, and makes use of the very general phrase "any other cause of indebtedness whatever," this language must be understood as limited to such causes of indebtedness as had been previously enumerated in the first section and no other. It was surely not the policy of the act to give part owners any advantages over general creditors, but to compel them to give a notice (which general creditors were not required to do,) in order to avail themselves of their liens.

As Rock's claim was a lien, under the act, and the second section provides that such liens shall have precedence of all other liens and claims, we think the court of common pleas correctly allowed it to be paid out of the proceeds of the sale.

Judgment affirmed.

THOMAS WEBSTER vs. McMAHAN, WILLIAMS & HARRIS.

The counsel for the defendants intending to be absent during the term to which this cause was returnable, engaged the services of another attorney to attend to his causes generally; he gave the attorney thus employed a memorandum of his cases; in this memorandum,

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the present case was marked "Webster vs. Harris & Williams." Upon examining the docket, the substitute attorney found no such case upon it. The cause was docketed by the clerk, "Webster vs. McMahan, &c," when the cause was called, no counsel appeared; a judgment by default was rendered. A motion was made to set aside the judgment, which was overruled. The judgment of the court below overruling the motion affirmed.

ERROR to St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

This was an appeal from a justice of the peace.

When the case was called for trial, there was no counsel appeared for the appellants in the court of common pleas, and the said court affirmed the judgment below.

A motion was made for a new trial, accompanied by affidavits showing that the counsel employed had left St. Louis for Jefferson City to attend the sitting of the supreme court, but that one of them had employed P. C. Grace Esq. to attend to the case when it should be called. That said Grace, on account of the form of the entry by the clerk of the court below, made in the index to the sitting of the docket, was not able to find the case, and consequently the case was not defended.

The question is, "Was there sufficient diligence shewn to justify the setting aside the judgment of affirmance and granting a new trial?"

This is the only question in the case.

CARROLL, for plaintiff in error.

This is purely a question of diligence. The defendants below, now plaintiffs in error, are surely not chargeable with lack of diligence. They did all in their power to do. Nor is the counsel liable to a charge of lack of attention. The original attorneys employed were both absent from the city, and although this is no defence or excuse *in itself*, yet it is no evidence against their conduct as to diligence, when a good and competent attorney was employed by them to attend to the case, who did do all they could have done in the case, had they been here. This attorney, so employed, diligently searched the index of cases on the clerk's desk, and could not find such a case as this there.

In the nature of things, it is impossible for attorneys to be always in one court room. There are many courts where attorneys are called by their practice, and it often happens that several of these courts are in session at the same time. The best then can be done, when an attorney is called to attend to business in more courts than one, at the same time, is to employ some competent lawyer to attend to his business for him in the court in which he cannot be present. This was done in this case.

On the docket of cases handed to Mr. Grace, this case was entered in this wise—"Webster vs. Harris & Williams." Now, on the index, the case was entered in this way—"Webster vs. McMahan &c." Now the case was against McMahan and Harris, and Williams also. But who could fairly guess that a case of Webster vs. Harris & Williams, would be docketed as a case of "Webster vs. McMahan, &c?"

The lack of care was very obvious on the part of the clerk who made up the index. That officer ought to state at least the names of the plaintiffs and defendants in his list of cases set for trial. If he does not state their baptismal names, he should certainly their family or surnames, and all their family or surnames, if there be more than one. Otherwise, difficulties similar to this may often occur. Suppose there be five defendants, and the name of only

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one of them is given, and each defendant employs a different attorney to attend his defence, and prepare his answer—(and under our new code this may often be the case)—how likely will each, *but one*, be misled by such a form of entry?

In the case of *Stout vs. C. & T. Lewis*, decided by this court in the 11th vol. page 438, the circumstances were not as strong as those attending this case, and yet the court reversed the decision of the nisi prius court, and ordered a new trial to be awarded.

There no attorney was present when the case was called. The counsel in the cause had voluntarily left the court room, and had provided no substitute. He had not spoken to any other attorney to represent him, or to send for him if the case should be called. The case was liable to be called at any moment, and yet he takes the responsibility upon himself of leaving the court room, and the case is called and disposed of in his absence. This court, in that case, excused his absence and ordered a new trial.

The defendant swears to a meritorious defence, and this is enough, as to that for the present.

If the case of *Stout vs. C. & T. Lewis*, above cited, had been before the court below, and the opinion of this court had been obtainable, I think the court of common pleas would have granted a new trial. I know he should have done so; therefore it is respectfully submitted that the judge of the court of common pleas erred in his refusal to grant a new trial.

GARDNER, for defendant in error.

The plaintiff, now defendant in error, relies upon the principle decided by this court in the following cases: *Austin vs. Nelson*, 11 Mo. R. 192; *Field & Cathcart vs. Matson*, 8 Mo. R. 686; 10 Mo. Rep. 392.

From an examination of the record it will appear that the entry of the case on the clerk's docket was the same as in the justices court, and it appears in the writ and other papers in the suit, to wit: *Thomas Webster vs. George McMahan, &c.*

It is manifest there was no error committed by the clerk in docketing the case whereby the defendants could have been deceived.

The defendants show no particular merit in this case, nor diligence in any manner equal to that shown in several cases in which the judgment of the court below refusing to set aside a judgment of default has been affirmed.

The principal case relied upon by the defendants, now plaintiffs in error, is that of *Stout vs. C. & T. Lewis*, in 11 Mo. R. 438. But surely there is nothing in that case to justify so manifest a departure from the uniform decisions of this court, as a reversal of the judgment of the court below in this case would be.

RYLAND, Judge, delivered the opinion of the court.

From the above statement the simple question before us is the discretion of the court below. Did the court below decide properly, that there was not sufficient diligence used by the defendants below, or by their counsel in making defence upon the appeal from the justice of the peace?

What was the diligence used? It seems that the lawyers who had been employed by the defendants below, thought it more incumbent on them to attend to some cases in the supreme court, and consequently went to Jefferson city, during the term of the court of common pleas, in which this case was tried. That one of the counsel employed Mr.

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Grace, an attorney at law, to attend to his cases in his absence in the court of common pleas, and in order that Mr. Grace might do so the counsel furnished him with a memorandum of the suits.

In this memorandum the present case was marked "Webster vs. Harris & Williams." Mr. Grace examined the list of cases for trial in the court of common pleas, the docket of the clerk of the court, and could find no such case. The clerk had marked the case thus, "Webster vs. McMahan, &c.," consequently Mr. Grace did not defend, and the case being called and no person appearing for the defendants, who were the appellants below from the justice of the peace, the judgment of the justice was affirmed.

Motion was afterwards made to set this judgment aside; affidavits filed in support of the motion, which was overruled.

Now the record shews that the suit was brought by Webster vs. John McMahan, Oliver Harris & John F. Williams, in the court of the justice of the peace. The plaintiff obtained judgment and the defendant appealed. The clerk of common pleas enters the case on his docket, "Webster vs. McMahan, &c." The defendant's original attorney gave his memorandum of the case to Mr. Grace whom he had employed, thus, "Webster vs. Harris & Williams," and complains of the clerk not making the case on his docket in the same manner.

Now I find no fault with the clerk. It was the hurry of the attorney to reach Jefferson City that made the incorrect statement of the parties names. If he had given the names of all the persons sued below, although he might have been employed by Harris & Williams, and not by McMahan, it would have easily led Mr. Grace to the true parties. He could have found the case; if there had been the slightest examination of the papers in the case of "Webster vs. McMahan, &c.," it would have immediately been known who the "&c." represented.

I am opposed to disturbing this judgment. Parties and their counsel must use more diligence. If in this case a correct memorandum had been given to Mr. Grace, or if he had only made the slightest examination of the papers in the case of Webster vs. Mahan, &c., he might have been fully informed upon this subject. I am not willing to say that there is *crassa negligentia* here, but I cannot find the due and sufficient negligence.

Let the judgment of the court of common pleas be affirmed.

 Pembridge and St. Louis Public Schools vs. Manter and Hicks.

MARY PEMBRIDGE AND ST. LOUIS PUBLIC SCHOOLS vs. FRANCIS H. MANTER
AND CHARLES W. HICKS.

ERROR, to St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

This was an ejectment brought in the St. Louis court of common pleas by the defendant in error against Mary Penbridge for a lot in St. Louis, fronting 30 feet on Broadway by 100 feet deep; the writ was served on the defendant below on the eighth day of August, 1849, and returnable to the September term of the court. On the 24th day of September, an interlocutory judgment was entered against the defendant for want of a plea, and on the 21st day of November, an inquiry of damages was had, the defendant not appearing. On the 9th day of January succeeding, and during the same term, motions were made on behalf of the defendant, and also of the said board of public schools to set aside the default and permit a defence in the suit on the merits. These motions were grounded on the affidavits of the lessee, of the clerk and the attorney of the board.

The affidavits set forth in substance that the lot of land sued for was leased under the board of public schools, that the lessee built a brick house on the lot, underlet a part of said house to the said defendant in the fall of 1848, that the lessee having learned that a suit had been commenced for the lot, applied to the sheriff's office for information and was there furnished with a memorandum of the parties to the suit as he supposed, he took this memorandum to the office of the board and left it there with the clerk and also gave notice of there being such a memorandum with the clerk to the attorney of the board. The attorney was furnished with the style of the suit as it appeared on the memorandum and carefully examined the dockets of the common pleas and circuit court, but found no trace of any such suit; on further inquiry the attorney was told that the suit about which he was seeking information had been disposed of and that the land on Broadway had been sold some short time before, upon the execution; the attorney concluding that the lessee had taken fright at the sale on execution and that no ejectment was in fact pending gave over further search. The affidavit of the attorney stated that he was acquainted with the respective titles, and he believed if the default were set aside, the defendant could successfully defend on the merits.

The court below overruled the motions, exception was saved and the case is now in this court by writ of error.

R. M. FIELD, for plaintiff in error.

The court committed error in overruling the motion to set aside the default.

The rule in ejectment cases on this subject is thus stated: "As the situations of claimant and defendant in ejectment are materially different, the courts are liberal in their rules for setting aside judgments against the casual ejector, although regularly signed, and will grant them even after execution executed, upon affidavit of merits or other circumstances which at their discretion they may deem sufficient." Tillinghast's ejectment 252 and cases cited.

Although the supreme court of this State in some reported cases seems to have established a rule in regard to setting aside defaults less liberal than that which is adopted elsewhere, the rule has never yet been extended to ejectments, nor will it justify the action of the court below.

Lecompte vs. Wash, 4 Mo. Rep., 557; Wimer vs. Morris, 7 Mo. Rep., 6; Green vs. Good-

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loe, ib., 25; Stigers vs. Darby, 8 Mo. Rep., 679; Field vs. Matson, ib., 6-6, Lament vs. Mullikin, 10 Mo. Rep., 495; Austin vs. Nelson, 11 Mo. Rep., 192; Stout vs. Lewis, ib., 438; Sloane vs. Forse, ib., 126.

CROCKETT, for appellees.

The appellants have failed to show cause by their affidavits, for setting aside the judgment, and granting a new trial. Field vs. Matson, 8 Mo. 686; Barry vs. Johnson, 3 Mo., 263; Wimer vs. Morris, 7 Mo. 6; Green vs. Goodloe, 7 Mo. 25.

RYLAND, Judge, delivered the opinion of the court.

The same question presents itself here, as in the case decided at this term of Webster vs. McMahan and others.

The question of diligence—it seems to me a little strange, that the inquiry had not been made of the clerk, of either the common pleas or circuit court. These officers would have informed the lessee, whether there had been a suit or not. If the attorney for the board had made enquiries of either of the clerks, he would have found out. These officers know the writs they issue; or they would have known, time enough to make out the docket—and that would have been before the return day of the writ. I am unwilling to interfere in this case with the judgment of the court below. The reasons given in case of Webster vs. McMahan and others, need not here be repeated.

Judgment affirmed.

HENSLEY & WRIGHT vs. PECK & BARNETT.

1. Where all the evidence given is not preserved by bill of exceptions, the propriety of giving or refusing instructions by the circuit court cannot be reviewed in the supreme court.
2. On the evening when the cause was submitted to the jury, the court, by consent, gave certain instruction; the next morning the jury returned into court and informed the court that they could not agree upon a verdict. the court then withdrew the instructions given and gave new ones. Held that the plaintiffs had a right to take a non-suit after the new instructions were given before the jury retired.

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APPEAL to St. Louis Court of Common Pleas.

B. A. HILL, for appellants.

The testimony in this cause having been concluded, the only remaining question arises upon the record and the instructions and action of the court thereon.

After the close of the testimony on the trial, the plaintiffs (appellants) asked the court to give the two instructions set forth in the transcript, and the defendants consented to the giving of said instructions, and the cause was thereupon submitted to the jury for their decision, and the court adjourned till next morning. When the court met, the jury not having agreed upon their verdict, the court upon the motion of the defendants, *withdrew* the instructions of plaintiffs which by their defendants' consent had been given the day before and gave an erroneous instructions of defendant, cutting the whole case off from the jury. Plaintiffs thereupon took a non-suit, with leave to move to set the same aside, and specified the foregoing as a reason for setting the non-suit aside and preserved the same in the bill of exceptions.

Now the plaintiffs by this singular action of the court, is placed under the statute, § 33, p. 821, in a singular dilemma. This statute provides that "no plaintiff shall suffer a non-suit after the cause upon a hearing of the parties, shall have been finally submitted to a jury, or the court setting to try the issue for their decision." There is no doubt, that the cause was finally submitted to the jury by consent of defendants upon instructions agreed to, and although the subsequent action of the court forced the plaintiffs to take a non-suit or to submit to a verdict, the question is whether the plaintiffs could legally take a non-suit under that statute. If the plaintiffs could not take a non-suit, as I am inclined to think in the case, then they are forever barred of their action by reason of the wrongful and unlawful action of Judge Blair, in the premises.

It seems to me that it would be but just to grant a new trial to the plaintiffs. We are injured by the wrongful act of the defendants, who having consented to submit the case to the jury upon the plaintiffs' instructions, as appears from the record, openly violated it, the next morning to our prejudice.

GANTT, for appellees.

There is no evidence preserved by the bill of exceptions, wherefrom it can be ascertained whether any particular fact was proved; or evidence offered tending to prove any particular fact.

The court has power at any time before the jury has acted upon the evidence, to instruct them as to the legal effect of established facts and to inform them of the legal principles by which their decision should be guided. There is no room for supposing that this power was improperly exercised in the present case.

3. The instructions complained of were given before the cause was finally submitted to the jury, as is evident from the fact that plaintiffs immediately took a non-suit thereupon; and therefore if not shown to be erroneous *per se* were not so in respect of the time when they were given.

RYLAND, Judge, delivered the opinion of the court.

In this case there is no bill of exceptions properly taken, saving all the evidence given in the court below; therefore, as to the proper or

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improper instructions given or refused, this court can form no opinion—the evidence is not preserved. The making out the testimony from the notes of the reporter months after they were taken, instead of being made out in full and submitted to the counsel and court immediately, if necessary for insertion in the bill of exceptions, will not be sanctioned by this court.

There is nothing, then, for this court to adjudicate upon, except the fact of the court, giving by consent instructions to the jury on the evening when the cause was submitted to them, and when the jury next morning informed the court they could not agree in their verdict, the court, on motion, withdrew these instructions and gave others. We cannot see that the instructions which the court first gave to the jury were correct or not, not having the evidence before us; nor can we see whether the instruction last given, after the first were withdrawn, is correct or incorrect. The act complained of is the withdrawing those already once given, and giving new and different ones.

We cannot see that the court acted indiscreetly or illegally in all this.

The first instructions given may have been wrong. It will surely then not be complained of that the court corrected this error before any injury arose to either party by withdrawing the instructions, and giving correct and proper ones.

We confess that such practice is rather strange, at least it is not common in this state. I have known additional instructions given to a jury after they had returned into court, not agreeing in their verdict, but this was at the request of the jury themselves. However, I am unwilling to presume the court did wrong; there may have been a necessity for this course in order to do justice between the parties.

It seems the plaintiffs think their case was *finally* submitted to the jury the evening of their retiring from the bar; that may be so, but still I am inclined to believe that whenever the jury returned into court and received new instructions, the first having been withdrawn, that any time after this new instruction was given, before the jury retired, that the plaintiffs had the right to take a non-suit.

In this case they took such non-suit, and I am willing that they should have every benefit arising from it.

Judgment of the court below is affirmed.

Steinman vs. Tolivar.

WILLIAM STEINMAN vs. WESLEY TOLIVAR.

1. If no objection was made to any of the evidence given in the circuit court, and no exceptions taken to any of the instructions given by that court for either party, the supreme court will not notice either.
2. The overruling a motion for a new trial is properly a subject which comes before the sound discretion of the circuit court; the supreme court must see that this discretion has been abused before it will interfere.

APPEAL from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

Wesley Tolivar, the appellee, sued Lubke & Penningrot, and attached the steamboat "Beardstown," as their property. William Steinman the appellant interpleads and claims the boat as his property at the time the attachment issued. Evidence a note for \$1200 executed to him by Lubke & Penningrot on the 1st Dec., 1847. 2. Conveyance of boat to trustee on the 18th March, '48 to secure said note. 3. Sale of the boat by trustee, and purchase by Steinman, and bill of sale and delivery of boat to Steinman.

Evidence of Lubke that the deed of trust was executed in good faith to secure the note which was also executed in good faith.

The appellee proved by three witnesses, Riley, Tice and Felt, that Lubke said before the sale of the boat the deed of trust was executed to secure the debts of said witnesses. One of the witnesses, Felt, also stated that Steinman, the appellant, stated after the sale that the deed of trust was intended to secure the debts of Tice and Tolivar.

MOREHEAD, for appellants.

Upon this state of facts it is insisted that the title of Steinman to the boat at the time the attachment was levied is unquestionable, unless there is positive proof of fraud in the execution of the note. fraud cannot be presumed. There is no proof in the case relating to the note, its execution, consideration or justness except by Lubke.

That the verdict of the jury was erroneous and that the weight of evidence was for the appellant, interpleader below.

If the statements attributed to Lubke by the three witnesses be true, (which is not admitted) yet if he did make the statement, that statement cannot affect the rights of Steinman, the justice of his note, or implicate him in a fraud. That statement could not affect the deed of trust solemnly executed of a different import. Besides, it was not made under oath; he now makes a very different statement under oath.

Again, if the statement be true, what does it amount to? Not that the note was not just and bona fide that was executed long before the debts of Tice, Felt & Tolivar began to accrue, and the witnesses with all their prejudices could not attach it, but that they, the witnesses, were impliedly beneficiaries of the trust with Steinman. The validity of the sale under the trust cannot be affected. If there is any advantage from this statement it is against Steinman himself for a portion of the proceeds of sale. The sale must stand good, made regularly and without notice, and the title under it is good. The case then comes before the jury on the part of Steinman with a note, deed of trust and sale, all unimpeached and sale regular, and one witness who proves the note and deed of trust executed in good faith; on the part of Tol-

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ivar, one witness, Felt, who proves that Steinman said after the sale the trust was intended to secure Tice & Tolivar. If there is any thing in Felt's evidence it is only as to liability of Steinman personally to Tice & Tolivar for proceeds of sale, it cannot as before stated affect the validity of sale. See case of Baker vs. Welsh, 4 Mo. R. 484, as to Lubke's evidence.

RYLAND, Judge, delivered the opinion of the court.

This was a suit by attachment in favor of Wesley Tolivar against Lubke & Penningrot.

The steamboat "Beardstown" was attached. William Steinman claimed the property as his, and filed his interpleader setting forth his claim. This claim was denied; a jury was empanelled, and they found a verdict against Steinman. He moved for a new trial, which was overruled and denied him. He therefore tendered his bill of exceptions, and brings the case here by writ of error.

The bill of exceptions shews that no objections or exceptions were taken by the interpleader to any evidence offered by either party below. Nor were any exceptions taken to any instructions refused or given by the court for either party below.

The facts were offered, and were presented to the jury without any exception.

The court gave instructions to the jury which placed the matter fairly before them.

We cannot now take notice of any illegal or improper evidence, if any such were offered; nor can we notice the instructions given, as no objection was taken to them below. The only point before us is the overruling the motion for a new trial.

Now this is properly a subject which comes before the sound discretion of the lower court, and in this matter we must see that the court abuses this discretion before we will interfere.

The jury had the whole facts before them, they knew what credit the witnesses were entitled to, and they could very properly see whether from the facts in proof there was any fraud or not between Steinman and Lubke & Penningrot about the sale and trust of the steamboat Beardstown.

We cannot interfere with the judgment of the court below in this case.

Nothing has been properly presented to us but the simple question of new trial or not, and there is no sufficient reason apparent on the record why there should be a new trial.

Let the judgment below be affirmed.

Walker vs. Seymour.

ISAAC WALKER vs. JESSE SEYMOUR.

1. Courts should not award a repleader, unless the ends of justice require it.
2. Defendant leased to plaintiff, for twelve months, a hotel, the rent to be paid monthly—amongst other things, plaintiff covenanted to have certain work done about the house after the first month's rent was received. This was not done. At the end of the year, in accordance with a stipulation in the lease, the lease was renewed for two years; the new lease contained a covenant to have the same work done. Held, that the renewal of the lease with a new covenant to do the same work stipulated for in the first, was not a waiver of the damages sustained by plaintiff by reason of a breach of the covenant in the first lease.

APPEAL from the St. Louis Circuit Court.

STATEMENT OF THE CASE.

This is an appeal by Walker from a judgment rendered by the St. Louis circuit court. Seymour, plaintiff below, brought covenant against Walker on an indenture of lease dated 9th March, 1844, wherein Walker leased to Seymour the Missouri Hotel in St. Louis, for one year, the term to commence on 1st April, 1844, for a rent of 150 dollars per month, payable on the first day of each month, with an agreement to renew the lease for two further years at the rent of two thousand dollars a year. The lease, which is signed by both parties, contains a covenant in these words, "And it is agreed that said Walker is to have the north end of the stone house rough cast, after the first month's rent is received by Walker." There were two counts in the declaration, on this lease, the first alleging the making of the instrument of that date, and setting it forth, and averring that by it the defendant agreed with the plaintiff, "that he, the defendant would repair or cause to be repaired at his own proper cost and expense, the said tenement, public house or hotel aforesaid, and that he would have the north end of said hotel rough cast after the first month's rent should be paid by said plaintiff to said defendant." The breach of the first count is for not repairing said tenement or hotel, and for not having it rough cast, according to the true intent of said indenture. The second count, after an imperfect averment of the making of an indenture, gives the instrument in *haec verba*. But this count does not allege that the defendant covenanted or agreed thereby to do anything. It merely says that such an instrument was made between them, and then copies it, and then proceeds to assign a breach, that the defendant neglects and refuses "to make the repairs, and to have the north end of said stone building rough cast, according to the terms and agreement in said indenture contained," &c. The record then states thatoyer was craved by defendant, and the instrument then is spread out, and the defendant pleads six pleas, to-wit:

- 1st. Non est factum to 1st count.
- 2d. To the 1st count, that Seymour did not pay the first month's rent within the time specified, nor did Walker receive.
- 3d. To 1st count, that defendant did repair said public house, and have it rough cast according to the true intent, &c.
- 4th. To second count, non est factum.
- 5th. To second count, that Seymour did not pay nor Walker receive the first month's rent within the time, &c.
- 6th. That defendant did have the north end of said stone house rough cast, &c.

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Afterwards several additional pleas were filed, viz :

1st. Additional pleas "as to so much of said first count as relates to damages sustained by plaintiff for the failure of the defendant to have the north end of said house, called a hotel, rough cast." This plea alleges an indenture made between said parties on the 24th April, 1845, whereby Walker leased to Seymour same premises, for two years, commencing on 1st April, 1845, and warranted to have the north end of said stone house rough cast, after the first month's rent should be paid, which was the same work mentioned in the count, &c., and that the first month's rent was paid, and thereafter, as soon as could be, Walker caused the work to be done, and avers it to be "the same work mentioned in the introductory part of said plea," and then the plea alleges that the plaintiff had waived the performance of said defendant's covenant, to have the north end of said house rough cast, and had given further time for the performance of the same, and rested the performance thereunder.

2d. Additional plea is the same as the foregoing, but is to the second count.

3d. Additional plea is to the second count, and alleges that by the said renewed lease the plaintiff released the defendant from all liability for damages for failing to have the north end of said house or hotel rough cast.

4th. Additional plea is to the first count, and alleges that by said renewed lease, he, the said Seymour, released the defendant from all liability for damages for failing to have the north end of said house or hotel rough cast.

Replications were filed as follows :

The first additional plea, that the said renewed lease or indenture was not made and delivered for the purpose of satisfying and discharging the several covenants in plaintiffs declaration mentioned, and that the plaintiff never agreed to extend the time for the performance of said covenants nor to waive their performance.

The replication to the second additional plea is that "the work mentioned in said plea as having covenanted to be done by said defendant in a certain indenture mentioned in said plea is not the same work covenanted to be done as alleged in the second count of said declaration."

The replication to the third and fourth additional pleas is that the plaintiff "never made any indenture by which he released or discharged the said defendant from the fulfilment of his covenants, nor did he waive the performance of the same."

Demurrers were filed to each of the replications to the 1st and 2d additional pleas, and a joint demurrer to the replications to the 3d and 4th additional pleas, which last also assigned special causes of demurrer.

The demurrer was sustained to the replication to the first additional plea and leave given to amend, and a new or amended replication filed thereto, whereby he averred that plaintiff did not waive the performance of defendant's covenant in first count mentioned to have the north end of said house rough cast by virtue of any lease or indenture in said plea mentioned.

The demurrers to the other replications were overruled.

A trial was had and all the issues were found for the plaintiff. On the trial the indenture of lease was given in evidence as also the renewed lease, and there was oral testimony that the north end of said hotel was not rough cast during the first year, though the plaintiff paid his rents punctually; but that immediately on payment of the first month's rent of the second year the defendant caused it to be done; that he spoke to the mechanic who did it to do it in May or June, 1844, but the witness did not and would not do it, as no proper sand could be got for such work that season. The north end of the building was partly brick and partly stone. It appears that the north end was upon an unfrequented street, and the failure to rough cast was of no injury in any way except as to the appearance.

The defendant asked the court to instruct the jury as follows, which instruction was refused and an exception taken to the refusal.

"That if the jury find from the evidence that the work covenanted to be done by said Walker on the house leased to said Seymour by the second lease, is the same work covenanted to be done in the first lease, they must find for the defendant, on the issue joined on the repli-

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cation of the plaintiff to the first additional plea of the defendant to the second count of the declaration."

The court gave the following instructions:

"The jury must find for the defendant on the first plea of the defendant to the first count of the declaration.

"2d. That the renewed lease read in evidence by defendant is no release or discharge or waiver of the plaintiffs right of action upon the covenant of defendant to repair.

"3d. That the plaintiff's covenant does not extend to any repair to be done by rough casting any other part of the north end of the hotel than that which was built of stone."

The record states that the defendant excepted to the giving of these instructions. This was undoubtedly true as to the 2d of them.

The defendant moved the court for a repleader, and for a new trial.

1st. Because the verdict was against law.

2d. Because it was against evidence.

3d. Against weight of evidence.

4th. That the court misdirected the jury.

5th. That the court refused instructions asked by defendant.

6th. That the court admitted incompetent evidence.

The motion for repleader was for the reason that the issue joined on the plaintiff's replication to the first additional plea of the defendant to the second count of the declaration was an immaterial issue.

Both motions were overruled and exceptions taken to the action of the court therein.

Oyer was waived, but the instruments were not set out, either in defendant's plea or plaintiff's replication, and therefore were not made part of the record.

1 Chitty's plead. 467-8, showing that when oyer is waived defendant may set it out in his plea, or not, as he pleases. In this case he did not do it.

SPALDING and TIFFANY, for appellant.

I. The finding of the jury on the first issue to the first count was against law and evidence both, for there was a variance between the lease declared on and the one produced: and the instruction of the court was in favor of the defendant on that issue which the jury disregarded. On this count the motion for a new trial was available. The variance is that the first count alleges that the lease declared on therein contained a covenant to *repair, or cause to be repaired*, the said hotel, but the lease produced contained no such covenant, and therefore the court told the jury to find for defendant on that count.

II. The court ought to have given the instruction asked by the defendant, as it required the jury merely to find the issue referred to according to the evidence. If this issue was material the instruction should have been given.

III. The court ought to have awarded a repleader, if said issue was immaterial as the finding on it did not settle the right, and a proper interest on that plea found for defendant, would have availed to defeat the plaintiff on the count. In that plea he has averred that the plaintiff had waived or released the covenant to rough cast the end of the house.

IV. The demurrer to the replication to the second additional plea ought to have been sustained; and indeed, the court so held it, when it refused to give the defendant's instruction asked in relation to the issue made by it on the ground that it was immaterial. And said demurrer should have been sustained for another reason, which is all-sufficient that the second count is bad, containing no averment whatever that defendant covenanted anything, but merely gives a copy of the lease verbatim, and then assign breaches. *Moore & Hunt vs. Platte county*, 8 Mo. Rep. 467. This demurrer was not withdrawn by defendant.

V. The instruction that the second lease given in evidence was no waiver, or release, or discharge of the plaintiff's right of action should have been refused. The new lease was a

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continuation of the first. It was stipulated for in it; and it gives a new time for doing the work, to-wit: as soon as the monthly rent should be paid, &c.

VI. New trial should have been granted for the reasons assigned when the motion was made.

VII. The second count did not contain any cause of action. It had no averment of any covenant made; it merely says that a certain instrument was made, and fails entirely to allege its legal effect.

BOWMAN, for appellee.

1. The judgment below was not erroneous—the verdict being abundantly sustained by the testimony in the case.

2. The judgment of the court below on the demurrer to 2d, 3d and 4th replications to defendant's pleas was not excepted to at the time, nor was the omission cured afterwards on the application for a new trial. It is now too late to object to the judgment.

10 Mo. Reports, 515.

3. The court did not err in refusing to grant a repleader—the replications are not very skillfully drawn, but they contain enough for purposes of substantial justice. The ground for the repleader urged below was that an *immaterial issue* had been made. Even, if so, all objection to the repleader had been waived, as defendant demurred to the same without demurring for that cause. But at all events, the court will not award a repleader unless it be necessary to effect substantial justice between the parties—Chitty's pleadings, vol. 1, 693—and there is nothing in this case to justify the court in awarding a repleader.

4. There is nothing in the case showing any good grounds for a new trial, nor did the court err in refusing it.

5. The court did not err in instructing the jury in regard to the effect of the *second lease*. There is nothing in that instrument which goes to show that either of the parties intended by any of its provisions to extend the time of performance or waive the plaintiff's right of action. The second lease was a renewal of the first pursuant to a covenant of renewal contained in the first lease. The kind of repair specified was of a nature to require its frequent renewal, and the jury had a right to infer that the parties intended to have the "rough cast" put on the second year as well as the first.

NAPTON, J., delivered the opinion of the court.

The facts of this case were these: Walker leased to Seymour the Missouri Hotel in St. Louis for a year from the 1st April, 1844, and among other things, covenanted in the lease that he would have the stone house rough cast after the first month's rent was received. This was not done, but at the end of the year, in accordance with another stipulation in the lease, a second lease was given to Seymour for two years more, and this contained the same covenant to rough cast the north end of the building. On the 17th April, 1845, Seymour commenced this action for the breach of the covenant in the first lease.

The pleadings in the case are fully set out in the statement drawn up by counsel, and I shall not repeat them. There was evidence before the jury of the damages likely to be occasioned by the want of the work

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covenanted for, and their verdict was for the plaintiff for \$270. The court instructed the jury that the taking of the second lease did not affect the question they were called upon to determine.

The whole case turns upon the point of law raised by this instruction.

The issue upon the replication to the first additional plea to the second count was immaterial, but the court is under no obligations to award a repleader unless the ends of justice require it. The instruction given settled the question of law for the plaintiff, and that question can as well be determined upon the instruction as upon the pleadings. It would be useless to send the case back if we concur with the circuit court in the second instruction given.

It is contended that the second lease gave the defendant until the expiration of the first month to set about repairing, and that this second covenant must be construed as a waiver of any damages sustained by reason of the first lease. We cannot assent to this reasoning. The fact that Seymour renewed his lease, with a new covenant to do the same work stipulated for in the first, might go to the jury as some evidence of the estimate placed by him on the extent of his damages, but it is not easy to construe such an act as a release or discharge. When the second lease had been taken, the covenant in the first was broken, and the right to damages fixed. This right might have been released or discharged, but the mere fact of taking another lease with another covenant to repair, did not produce this effect.

We shall let the verdict stand. Judgment affirmed.

GREELY & GALE vs. JOHN McNABB.

Instructions which contain mere abstract legal propositions, not arising necessarily from the facts of the case, ought not be given.

APPEAL from St. Louis Circuit Court.

STATEMENT OF THE CASE.

This was an action of indebitatus assumpsit brought by appellee against the appellants to recover money alleged to have been had and received by the defendants below to the use of plaintiff.

At the trial, the partnership of defendants was admitted. The plaintiff then read the deposition of John Easterly, who deposed, in effect, as follows: that deponent was agent of

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plaintiff; that as such agent he made a sale of goods to one Joseph Haven, taking for the amount of such sale, Havens' negotiable note, payable at six months after date to the order of S. Thorp, and endorsed by Thorp. At the time when said note became due, deponent was absent from St. Louis and had it in his possession; said note, was therefore not duly presented for payment at its maturity and by such neglect the endorser was discharged. Deponent presented said note to Mr. Haven for payment, some ten or twelve days after its maturity. Haven said that his business had passed into the hands of Macy & Sons of New York for settlement, that the defendants, Greely & Gale were their agents, and that he, Haven would have to see Greely before he could arrange it. Deponent called at defendants store, found one of defendants there, and made known his business to said defendant. Defendant, Gale said, "it is all right, the money is here ready for you." He then said, "wait until Mr. Greely (the other defendant) comes in, and we will pay it to you." Greely coming in said it is all right, the money was there. He then told deponent to go to Haven and get him to write "pay it" on the note, and then they, defendants, would pay deponent the money. Greely also said that the note ought to have been there when due and that deponents might have fallen into bad hands, but it was all right. Deponent then called at Haven's house. Haven refused to see him, but sent him word that he, Haven, could not do any thing further about it. Deponent then returned to Greely & Gale's store, when Mr. Greely said that he, Greely, could not for his life see why Haven did not order the note paid, as there had been arrangements made in the sale to Macy & Sons for the payment of the note. Greely then went to see Haven—Haven still refused to order the payment of the note. In accordance with the advice of defendants, deponent then left the note with defendants, who agreed to write to Macy & Son, and said that Macy & Son would without doubt order the note paid. The book-keeper of defendants remarked to deponent, at the time, that he could not see why the note was not paid, as he had been to the brokers and the bank with the money to pay it. The plaintiff here rested.

Defendants called their book-keeper as a witness, who testified, in effect, that on the day when said note became due he endeavored to find it, but could not; that the note was not presented at maturity; that as book-keeper, he would necessarily have knowledge of any money left with defendants for any purpose, that he was directed to pay the note, but did not recollect particularly by whom; that Haven at the time the note fell due had failed and had transferred all his goods to Macy & Son, of New York, and that defendants were agents, acting in that business for Macy & Son, received payments made for them and remitted the money; that at the time of the transfer from Haven's to Macy & Son, some arrangements were made concerning the payment of this note, as witness was informed or had understood; that Haven had no money deposited with said defendants, to the knowledge of witness, but money had been received of him for Macy & Son, arising from sales or collections made by Haven for them; that the defendants after presentation of the note by Easterly, applied to Macy & Son for permission to pay said note, which they declined to give, and refused to direct its payment; that money, received for Macy & Son, was remitted from time to time, when there was any amount, say \$300 or \$400; how the account was when Easterly called, witness could not state; that the endorser on said note was an accommodation endorser, and had no interest in the original transaction; that Macy & Son, is a firm residing and doing business in the city of New York. Haven had been a merchant in St. Louis, where defendants reside and do business.

Defendants then asked the following instructions:

1. If the court sitting as a jury, find defendants had no interest in the note in question and were not liable for the payment of same, but had been directed to pay the same at maturity thereof, and that, at the time they were applied to by the witness Easterly, the defendants had no funds of the maker in their hands, but supposed from prior directions they would be again directed to pay the note, and such direction was withdrawn, they are not liable for the payment thereof.

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2. A promise, to charge the defendants for the note, must be in writing, unless it appears they undertook the payment upon some new and original consideration.

3. There is no priority between the plaintiffs and defendants, and if they were mere agents of Macy & Son, or were depositors of Haven, the defendants are not liable personally to the plaintiffs, especially if both Haven and Macy & Son, refused to permit the application of any funds in hands of defendants to payment of the note.

4. The defendants as mere depositors or agents are not in any manner liable to the plaintiff to pay his debt, unless it appears they have made some engagement so to do.

Of which instructions the 1st and 4th were given, and the 2nd and 3rd were refused.

The plaintiffs then asked the following instruction, all of which were given, to-wit:

1. If the court, sitting as a jury, believe from the evidence, that the plaintiff or his agent made a demand on the defendants for the payment of the note in question, after the maturity thereof, and that, at the time of such demand defendants had, in their possession, funds placed in their hands by Haven, which he had directed to be applied, and which defendants had agreed to apply to the payment of the note in question, the court should find for the plaintiff, unless it shall appear in evidence, that Havens had countermanded such application of such funds before the time of said demand.

2. If the court sitting as a jury, believe from the evidence, that the business of Haven had passed into the hands of another firm, subsequent to the making, and prior to the maturity of the note in question, that said firm had placed funds in the hands of defendants to provide for the payment of said note, which funds defendants had agreed so to apply; that plaintiff or his agent made a demand on the defendants for the payment of said note, after the same became due, the court should find for the plaintiff, unless it appears in evidence that said firm countermanded such application of said funds before the time of said demand.

3. If the court, sitting as a jury, believe from the evidence that plaintiff or his agent demanded of defendants the payment of the note in question, and that at the time of such demand they had in their hands funds deposited with them for the purpose of meeting said note, and that when said demand was made, they promised to pay the plaintiff, the court should find for the plaintiff.

4. If the court, sitting as a jury, find from the evidence, that money was on deposit in the hands of defendants, at the time the note became due, for the purpose of paying said note—deposited in their hands by Haven or Macy & Son or any one else, then, said money was fixed for the payment of said note, in whosoever hands it might be, and the said defendants became liable to the owner of said note whoever he should be, for said money, unless before demand thereof, it be proved that the deposit had been withdrawn.

The court below rendered judgment for the plaintiff; defendant moved for a new trial on the usual grounds, which motion was overruled, and defendant appealed to this court.

HAIGHT, for appellants.

1. The evidence taking the statement of plaintiff's agent, Easterly does not make out any promise to pay or any deposit of funds by Haven to meet the note at all events.

2. The defendants had no money of Haven deposited with them to pay the note. They had funds in hand or would undoubtedly advance for Macy & Son if they had not. They had money, but no money of Haven.

3. 2d and 3d instructions embrace correct principles. The 2d presents a principle applicable to the case and ought not to have been refused.

4. The last instruction given for plaintiff is the one which presents the case in an aspect which gives a verdict to the plaintiff and presents a sweeping proposition. If I leave money with my agent or clerk to pay a note the money is always applicable to that paper, is fixed for it and I cannot withdraw it. The clerk or agent is bound to pay, and that irrevocably—it needs no argument to refute such a principle.

Greely & Gale vs. McNabb.

HARDING, for appellee.

1. The court below did not err in giving the instructions asked by the plaintiffs. 1 John. Ca. 205; 17 Mass. 575, 400; 1 B. & P. 296; 1 Cai. 363; 3 J. R. 83, 12 J. R. 276; 7 Watts & S. 89; 8 Porter, 333; 4 Ala., 684; 10 Mass. 487; 1 Ves. 331; 3 B. & C. 842; Sto. ag. § 447; 2 Story Eq. Ju. § 972, 1042-3; 2 Gr. Ev. § 109; 2 Met. 381; 1 H. B. 242; 7 H. & I. 157; Corl vs. Riggs et al. 12 Mo. R., not yet published.

2. The court below did not err in refusing the 2nd and 3d instructions asked by the defendants.

3. The finding of the court below was in accordance with the weight of evidence. But this court will not disturb the finding of the court below if there be no material error in the instructions, unless it shall appear that there were no facts to warrant said finding. *Allen vs. Anson's adm'r*, just decided in this court.

A deposite of chattels, if received as cash, or if they were to be turned into cash and sufficient time therefor has elapsed, is the same as a deposite of money. 2 Gr. Ev. § 118; 7 W & S. 89.

4. This case was submitted to the court below, upon the facts appearing in the bill of exceptions. It cannot be said, therefore, that any of the instructions "tended to mislead the jury." If then upon the whole case the plaintiff ought to have recovered, the judgment ought not to be reversed, even though there may have been a wrong instruction given or a proper one refused.

RYLAND, Judge, delivered the opinion of the court.

The above statement is so full and complete that nothing remains for this court but to see if the instructions given and refused were properly given and refused by the court below.

There was no jury in this case; the facts were submitted to the court, and from the evidence before the court and the general principles of the law involved in the instructions given, I am inclined to agree with the court below, that the law of the case upon the facts was with the plaintiff below.

The instructions refused on the part of the defendants, were refused on the ground of their being mere abstract legal propositions, not arising necessarily from the facts in the case and not necessary to be declared by the court, in order to a proper adjudication of the merits of the case before it.

The first instruction given by the court for the plaintiff declared the law properly, and brought the whole merits of the controversy before the court. I find no fault with this instruction; and the verdict and judgment are in accordance with the facts under this instruction.

The other instructions are mainly of the same character. The defendants below, plaintiffs in error, find fault with the last instruction, because the court is required to declare that the money so placed in the hands of the defendant below became *fixed* for the payment of the note in controversy.

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We think this instruction might as well have been omitted. The merits of the case were properly under the law as declared before the court without this instruction. As there can be but little doubt that this instruction operated slightly if any to the defendants prejudice, I feel unwilling to reverse the judgment.

The practice of incumbering the record with a string of instructions all alike in substance, differing in phraseology only, is to be reprehended; no good can arise from such a practice, and evil may.

Upon the whole record of this case, I find the merits were fairly placed under the law before the mind of the judge who was trying it as a jury; and I feel that justice has been done, and am unwilling to disturb the judgment below.

Judge Napton concurring, the judgment below is affirmed.

JOHN F. DARBY, GARNISHEE OF WM. T. SMITH vs. JOSEPH CHARLESS.

1. Where a correct instruction asked by a party has been refused, but afterwards given substantially in another form, the refusal to give it in the form asked is not good cause for reversing the judgment.
2. Where the merits of the case have been fairly placed before the jury, the supreme court will disregard all informality in making up the issue.

APPEAL from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

On the 25th August, 1847, the appellee, Charless, commenced an action of assumpsit against William T. Smith, surviving partner of Colburn & Smith, in the St. Louis court of common pleas, by process of attachment returnable to the succeeding term for that year. The affidavit for the attachment states that the defendant was indebted unto the plaintiff in the sum of \$882 70, with interest at the rate of ten per cent. from the 15th of March, 1847. The appellant, Darby, was summoned as garnishee, on the 21st of August, 1847, and allegations and interrogatories were filed on the 27th of August. On the 26th of November, 1847, Darby filed his answer, denying that he owed defendant anything, or that he had in his possession or control any money or property of any kind belonging to defendant. But stating that on the 26th of April, 1847, he administered as public administrator of St. Louis county upon the estate of Norris Colburn. That afterwards and on the 12th of June of that year, the probate court of said county, having full jurisdiction in the premises, upon proper grounds being laid therefor by affidavit, issued a citation against John Lewis of Independence, Mo., for embezzling and unlawfully detaining certain checks on the Bank of the State of Missouri, belonging to the

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deceased. That the probate court, after investigating the matter, adjudged and ordered said Lewis to deliver said checks as the property of said deceased Colburn to said Darby, as his administrator; and accordingly that Lewis delivered over said checks as the property of said Colburn to Darby, as his administrator, who received them as a part of the estate of his intestate, the said Colburn. That the checks were payable to bearer or to order, and endorsed in blank, and amounted to \$2293 09. They were scheduled in detail in his answer and were drawn by D. Spalding, B. Walker, Wm. D. McKissack and A. F. Garrison, much the largest portion by S, a part by W., one by McK., and one by Garrison.

At the February term, A. D., 1848, the common pleas ordered that the defendant be notified that an action of assumpsit had been brought against him for \$882 70, that his property had been attached, and that unless he appeared at the next term of the court, to be held at St. Louis on the 3d Monday of September next, and plead, &c., &c. Afterwards at said September term, proof of publication of the order was made, and judgment by default rendered thereon against the defendant and damages assessed by the court on the rote sued on, and judgment entered up for \$983 58, and no rate of interest specified in said judgment. On the 23d of February, 1848, the plaintiff filed what he styled a denial of the answer of the garnishee, in which he stated that the garnishee when summoned as such had in his possession money and effects as set forth in plaintiff's allegations and interrogatories, and that the checks on the bank of Missouri enumerated in the answer were the property of the defendant, Smith.

On the 2nd of October, 1849, a trial was had between the plaintiff and the garnishee, Darby, and the jury found that the allegations affirmed in the denial of the garnishee's answer were true as therein stated. And thereupon the court rendered judgment against the garnishee, Darby, for \$1045 77 and costs of plaintiff in the whole of the proceedings as well against the defendant as against the garnishee.

On the trial the plaintiff proved the partnership of Colburn and Smith, and that they were traders doing business in Santa Fe, and that Colburn was carrying on no business except in company with Smith. That in March, 1847, Colburn being about to leave Santa Fe for the United States, he took with him as a member of said firm about nine or twelve thousand dollars of gold dust, coined gold, treasury notes, and checks drawn by Spalding & Walker, which were packed by the witness, Giddings, who had been a clerk for Colburn & Smith. That on the route from Santa Fe to Independence Colburn sent Leitendorfer, a witness, forward in advance of himself, putting into his hands a pair of saddlebags, which he took to Independence and delivered to a clerk of Mr. McCoy, of that place, and Colburn shortly afterwards was killed. Leitendorfer never had possession of the saddle bags or their contents afterwards. Their contents, however, were examined and inventoried and delivered to John Lewis, of Independence, for safe keeping.

The garnishee then read his answer in evidence to the jury.

And then the garnishee asked the following instruction:

"If the jury find from the evidence the checks mentioned in the answer of Darby were in the possession of Norris Colburn at the time of his death, and were either drawn payable to bearer or endorsed in blank by the payees or endorsed payable to bearer, then the said checks were in law *prima facie* the property of said Colburn."

But the court refused to give this instruction as asked, and the garnishee excepted. And the court added to the instruction aforesaid the following, "But said presumption can be rebutted by proof of property in said checks in other persons."

After verdict the garnishee moved for a new trial, assigning the ordinary reasons and that the court erred in instructing the jury. He also moved in arrest of judgment for errors apparent on the record. Both of these motions were overruled by the court below, and the garnishee excepted.

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RYLAND, Judge, delivered the opinion of the court.

From the above statement, it will be seen, that the errors complained of, consist in the refusal of the court to below, to give the instruction as asked for by the defendant below, and in giving it afterwards with the addition thereto made by the court. Also, in overruling the motions for a new trial and in arrest of judgment.

The instruction prayed for is as follows: "If the jury find from the evidence that the checks mentioned in the answer of Darby, garnishee, were in the possession of Norris Colburn, at the time of his death, and were either drawn payable to bearer, or endorsed in blank by the payees, or endorsed payable to bearer, then the said checks were in law *prima facie*, the property of said Colburn."

The court refused to give this instruction as asked for, but gave it with the following words added: "But said presumption can be rebutted by proof of property in said checks in other persons." This was all the instruction asked or given. The defendant below excepted to the opinion of the court in refusing to give his instruction in his own words.

We think the court below might just as well have given the instruction as prayed for by the defendant; and then afterwards given a second instruction embracing the proposition in the words which were added as above, as to have refused the instruction in the first instance, and afterwards give it with the addition as stated above.

The defendant, however, has no just cause to complain. His own instruction carries with it on its face, the meaning that it afterwards assumed in the shape which the court gave it—any mere *prima facie* case may be overturned by proof to the contrary—and the words added above to the instruction were only enabling the jury to understand plainly what every lawyer understood before.

What injury then has Darby suffered? Were the jury misled by the words added by the court? I presume not.

Does the law suffer the administrator of a deceased partner, to hold as the property of the deceased, all the funds and money of the partnership on hand at the death of the partner, in exclusion of the rights of creditors of the living partner, or in exclusion of the living partner himself?

The motion for a new trial was properly overruled, as the court committed no error in the instruction given, in the manner in which it was given.

There is nothing in the reasons assigned to support the motion in ar-

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rest; the issue was well enough made up; the similiter might be added if necessary at any time; all informality in denying the answer, and in making up the issue for the trial by jury, so that the merits have been fairly placed before the jury, will be by this court disregarded. If we see that the merits have been fairly placed before the jury, and have been passed upon by them, that will suffice.

The question whether an administrator, as such, can be garnisheed for a debt due by his intestate, does not arise in this case. The money in Darby's hands was found to be the money of Smith, not of Colburn; Darby is not garnisheed as administrator of Colburn. He states how he came in possession of Smith's money; that is the possession of money which the jury by their verdict say is Smith's.

The allegations do not charge him, as having the money of Colburn in his hands, but the money of Smith; if he has the money of Smith in his hands, he has it not as administrator, but as John F. Darby.

Smith's money was paid to him as Colburn's administrator. He can be garnisheed then by a creditor of Smith.

Upon the whole record we find nothing calling on this court for its interference.

The judgment below is affirmed.

JACOB SWARTZ vs. DANIEL D. PAGE.

1. The title of the inhabitants of St. Louis, to the *commons* adjoining the town, under the act of Congress of June 13, 1812, must prevail over a title confirmed by the act of Congress of July 4, 1836.
2. A deed regular on its face, from the city of St. Louis under its corporate seal, for a part of the *commons*, executed under the provisions of an act of the general assembly of this state, approved March 18, 1835, is *prima facie* evidence, that all the prerequisites of that act required before a sale, have been complied with. Nor can a claimant be allowed to urge that the prerequisites have not been complied with unless he holds a conflicting title from the city.

APPEAL from St. Louis Court of Common Pleas.

STATEMENT OF THE CASE.

This was an action of ejectment, brought by Page against Swartz, to recover a lot lying

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within the St. Louis commons, and also within the confirmation of James Mackey or his legal representatives by the act of 4th July, 1836.

At the trial, the then plaintiff, gave in evidence a duly certified plat and certificate of survey made under the authority of the United States, being survey No. 3125, and which it was agreed truly represents the out boundaries of the commons confirmed to the inhabitants of the town of St. Louis by the act of Congress, 13th June, 1812, and relinquished to the said inhabitants in full, properly according to their several rights therein, to be regulated according to the laws of the State of Missouri, by an act of Congress, approved 27th January, 1831.

The plaintiff then offered in evidence an instrument purporting to be the deed of the Mayor, Aldermen and citizens of the city of St. Louis to George Morton bearing date the 10th May, 1836. Executed by the Mayor and Register of the city of St. Louis, signing their names and causing the common seal of said city to be affixed on the 10th April, 1836, the instrument is signed,

JOHN F. DARBY,

GEORGE MORTON, [SEAL.]

The seal of the corporation is affixed apposite the——and the words "By the Mayor" signed, J. A. Wherry, Register of the city of St. Louis.

This instrument commences: This deed (being a compromise sale) made this 10th day of May, in the year of our Lord, 1836, between the Mayor, Aldermen and citizens of the city of St. Louis of the county of St. Louis and State of Missouri, party of the first part, and George Morton of the city, county and State aforesaid, of the second part, witnesseth, that the said party of the first part in consideration of \$900 in hand paid by George Morton, have bargained, sold and quit claimed, and by these presents, do bargain, sell and quit claim, unto said George Morton his heirs and assigns forever, all that tract of land, &c., setting out a minute description, which may be stated in general terms, to be bounded north by Chouteau's mill tract, west by the west line of lot No. 6, in the St. Louis commons as surveyed by Chas. De Ward, south by the center of Park avenue, and east by the east line of St. Louis commons, embracing lots number two, three, four, five and six, containing forty five acres, exclusive of the avenues bounding and running through the land surveyed. This description is followed by the Habendeen, and a special covenant limiting the warranty against the grantors and persons claiming under them.

The deed appears to have been acknowledged before a justice of the peace of St. Louis county, by John F. Darby and George Morton, who the justice certifies "are personally known to him to be the persons whose names are subscribed to the instrument," on the 10th of May, 1836. It was recorded the same day.

The defendant objected to reading the deed in evidence on the following grounds:

First. That it did not appear that any election was held as required by law, nor was there any evidence that a majority of the owners had consented to the sale of the commons.

Second. That it does not appear that George Morton, at or before the date of the deed had any claim within the commons conflicting with the claim of the city of St. Louis.

Third. That there is no evidence of any settlement or compromise made by the Mayor and board of Aldermen of the said city.

Fourth. That the deed was not made by the Mayor and board of Aldermen, or that the same had been authorized before or ratified after it was made, by the board of Aldermen.

The court overruled the objection and allowed the deed to be read to the jury, to which decision the defendant excepted.

The deed was then read, and the defendant admitted that the land therein described is wholly within the survey No. 3125, and is part of the commons confirmed and relinquished to the inhabitants of St. Louis. The plaintiff then proved that all the right, title, estate and interest of George Morton in the land described, was vested in the plaintiff by a deed made by the sheriff of St. Louis county, bearing date the 15th March, 1845. That the defendant was at the commencement of this suit in possession of a small portion of the land described in the deed just mentioned, and gave evidence tending to prove damages sustained, and the monthly value of the part in possession of the defendant.

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The plaintiff admitted that no part of survey No. 3125, or of the commons of St. Louis was within the limits of the city of St. Louis, as it stood incorporated at any time prior to the 31st March, 1841.

The defendant then read in evidence so much of the report of the recorder and commissioners laid before and confirmed by an act of 4th July, 1836, as relates to the claim No. 54 of James Mackey, claiming 200 and more arpents, under a concession of 9th Oct. 1799, for two hundred and some arpents bounded on the north by land of August Chouteau, south by that of Soulard east by the public road going from St. Louis to Carondelet, and west by the domain and a survey certified by Antoine Soulard, 17 Dec. 1802, confirmed to James Mackey, or his legal representatives according to the concession, and it was agreed that the land in controversy lies within the concession, survey and confirmation.

The defendant then read in evidence:

1. A deed executed by Isabella Mackey executrix of James Mackey deceased, (in pursuance of a power contained in the will of said Mackey,) whereby she conveyed to Arund Rutgers all the estate and interest of the testator at the time of his death in and to a parcel of land containing 33 arpents French measure described by metes and bounds, "which include the land in controversy" being part of the land granted to and surveyed by James Mackey as before stated, which deed bears date the 5th May, 1825.

2. A deed of the sheriff of St. Louis county, dated the 18th of January, 1825, under and by virtue of judgments and executions against the executrix of James Mackey deceased, conveying to Abner Blaisdell a tract of land containing "fifteen acres and nineteen hundredths of an acre," bounded, eastwardly by lands of Arund Rutgers, north by land of Chouteau, west by lot No. 3, on a plat referred to, and south by Antoine Soulard deceased, which land is admitted to be within the commons of St. Louis, and also within the concession and survey in favor of James Mackey, "and does not include any part of the land in controversy."

3. A deed dated 9th May, 1828, from said Blaisdale and wife conveying to James W. White and Michael Gorman, the land described in the deed last above mentioned.

4. A deed from said White and Gorman, dated 9th November, 1830, conveying the same land to George Morton.

The defendant then read to the jury a transcript of the records, of the proceedings of the board of Aldermen of the city of St. Louis, by which it appears that on the 2d April, 1836, the committee on the commons made a report which was adopted. The report is set out *in extenso*. The clause which relates to the claimants under Mackey is in these words:

"They have also had the petition of P. M. under consideration, and would respectfully recommend to the board a compromise predicated on the following basis: First, the Mayor and board of Aldermen of the city of St. Louis will convey all their right and title to the land within the survey of the commons, "known as the Mackey claim to the representatives of said Mackey," for and in consideration of twenty dollars per acre, the purchasers to be placed on the same grounds with regard to payments as the other purchasers of land within the commons with the additional privilege of paying the principal of said purchase whenever they may think proper to do so."

The report closes in these words: "To bring about a definite action by your honorable body on the several recommendations in the above report, the committee recommends the adoption of the following resolutions:"

The first resolution relates to a conveyance of the United States, of seven acres of land for \$300. The 4th and last proposes that the members of the committee shall have \$5 per day, each for their services. The others being the second and third of the series, are in these words:

Resolved, That P. M. Dillon, George Morton and Frederick Dent, being the legal representatives of "James Mackey," shall receive deeds for the "lands claimed by them," and which is within the survey of the commons by their paying twenty dollars per acre therefor, and that they have the privilege of paying the principal at the time of executing the deeds, "or at any time hereafter, which may suit their convenience within ten years."

Resolved, That the deeds to be executed by virtue of the power given the board to make

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compromises, express that it is a compromise sale, and that persons so compromising be entitled to pay the amount agreed upon down, or avail themselves of the advantages advertised in the notice of the sale of the commons.

The defendant proved by the register of the city and keeper of the records of the board of aldermen, that the transcript includes all the proceedings of the board of aldermen in relation to the claim of George Morton and other persons, claiming under James Mackey within the commons.

The defendant then offered to prove by the testimony of the members of the board of aldermen, who were members of the committee on the commons, and were produced as witnesses, that George Morton did not claim before the committee or the board, before or at the time of the passage of the resolution contained in the transcript, any part of the land in controversy; that he claimed only the parcel described in the deed from White and Gorman to him, read in evidence by the defendant; that no other claim of said Morton within the commons was known to the board of aldermen, and that the resolution of the board referred to the claim theretofore made and no other; that said Morton was a member of the board of aldermen and of the committee on commons, and was present acting as a member of the board when the report of the committee was adopted; and one of said witnesses being produced and sworn, the court could not permit him to be examined or hear any testimony touching the facts so offered to be proved—to which decision exception was taken.

The defendant read in evidence the act of the general assembly incorporating the inhabitants of St. Louis, approved 9th December, 1822, which is to be used in the supreme court as if set forth at large.

No other evidence material to the issue was given.

The court, at the request of the plaintiff, instructed the jury as follows :

If the jury find from the evidence that the land in controversy is embraced within the commons of the town of St. Louis, as confirmed by the act of 13th June, 1812, and as said common was surveyed under the authority of the United States according to the survey thereof given in evidence, and that it is included within the land described in the deed from the mayor, aldermen and citizens of the city of St. Louis to George Morton; that such deed was executed as it purports to have been, and the same land is included within the land conveyed in the deed of the sheriff to the plaintiff, then the title of the plaintiff is superior in law to the title under the confirmation to James Mackey by the act of Congress of the 4th July, 1846, and if they find that the defendant was in possession of the land in controversy at the commencement of this suit, they will find for the plaintiff.

To which the defendant excepted, and prayed the court to instruct the jury as follows :

1. The deed dated the 10th May, 1836, signed by John F. Darby, then mayor of the city of St. Louis, and George Morton, given in evidence by the plaintiff, does not operate to pass the title of the inhabitants of St. Louis to the land therein described to George Morton.
2. Unless the jury find from the evidence that George Morton, before the 10th May, 1836, had a claim to the land described in the deed of that date, and that the mayor and board of aldermen did settle and compromise said claim, and authorize the execution of said deed, then George Morton acquired no title to the land in controversy by virtue of said deed.
3. The deed of 10th May, 1836, furnishes no evidence that George Morton had a claim to the land therein mentioned conflicting with the inhabitants of St. Louis, or that his claim had been compromised by the mayor and board of aldermen.
4. Unless the jury find from the evidence that prior to the 10th May, 1836, a majority of the owners of the commons qualified to vote, consented to the sale thereof in the manner provided by an act of the general assembly of the state of Missouri, entitled an act to authorize the sale of the St. Louis commons, approved the 18th of March, 1835, the deed executed by John F. Darby and George Morton given in evidence in this case is void.
5. If the jury find from the evidence that prior to 10th May, 1836, George Morton had no claim to the land in controversy, and that the board of aldermen of the city of St. Louis did not authorize or assent to the conveyance of said land by the mayor, then the deed executed

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by the mayor and said Morton did not pass the title of the inhabitants of St. Louis in said land.

6. If the jury is satisfied by the evidence, that the proceedings of the board of aldermen read in evidence by the defendant, exhibit all the acts of the board of aldermen in relation to the claim of George Morton, under James Mackey, in the common of St. Louis, and that no claim then made by said Morton included any part of the land in controversy, then the mayor was not authorized to convey said land.

7. If the jury find from the evidence that before and at the time of the passage of the resolution in relation to the claims under James Mackey, George Morton was a claimant to a parcel of the tract originally granted to Mackey, and that such parcel was designated by metes and bounds, not including the land in controversy, or any part thereof, then the resolutions are to be construed as a compromise only of the claim actually made, and to authorize a conveyance of the land so claimed and no other; and the deed executed by the mayor does not operate to convey any title to the land in controversy.

8. If the jury find from the evidence that the tract of land described in the deed of the 10th May, 1836, is part of the land originally granted to James Mackey, and within the St. Louis commons; that George Morton had a claim to a parcel of said land, designated by metes and bounds, which excluded the land in controversy; that he had not before the 2nd April, 1836, any other claim as representative of James Mackey within the commons, then the resolutions of the board of aldermen of that date authorize a conveyance only of the parcel so claimed, and if the jury also find that there was no other act, resolution or proceeding of the board of aldermen, relating to any claim of George Morton within the commons, then the aforesaid deed of 10th May, 1836, does not operate to convey the land in controversy, or any part thereof.

9. The resolution and proceedings of the board of aldermen, given in evidence, do not authorize the conveyance to George Morton of any part of the commons to which he had no claim, or which he did not claim as representative of James Mackey. If therefore there was no other acts or proceedings of the board of aldermen authorizing a conveyance to said Morton of lands in the commons, the authority of the Mayor was limited to the parcel actually claimed, and did not authorize him to convey to said Morton other lands not embraced within any claim made by the said Morton or known to the board of aldermen.

10. The Mayor and board of aldermen had not on the 10th May, 1836, any power or authority to sell and convey any portion of the St. Louis commons at private sale, nor had they authority to convey any parcel of said commons, which was not claimed by any person adversely to the inhabitants of St. Louis, or purchased at public sale.

11. The Mayor of the city of St. Louis had not, on the 10th May, 1836, or before, any power or authority to convey to any person any part of the commons which had not been sold at public sale without the persons assent or subsequent ratification of the board of aldermen.

12. The Mayor and board of aldermen had no power or authority by way of settlement or compromise, or otherwise, to settle and convey lands within the commons to which there was no claim conflicting with the claim of the inhabitants of St. Louis.

13. If the jury find from the evidence that prior to 10th May, 1836, George Morton had not, and that Arund Rutgers or his representatives had, a claim to the land in controversy under James Mackey, and that the proceedings of the board of aldermen, given in evidence by the defendant, exhibits all the acts, resolutions and proceedings of the said board relating to the claims under James Mackey; then the said deed of the 10th May, 1836, under which the plaintiff claims, does not operate to convey the land in controversy to him.

14. The Mayor of the city of St. Louis had not authority to convey lands in the commons to persons who had not any claim thereto, to the exclusion of those who had claims conflicting with the claim of the inhabitants of St. Louis, and therefore the deed of 10th May, 1836, does not operate to vest in George Morton a title to the land in controversy, if it ap-

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pears to the satisfaction of the jury that he had no claim to said land, and that Arund Rutgers and his heirs were the legal representatives of Mackey in respect to said land.

Which instructions, and each of them, the court refused to give, and the defendant excepted to the decision.

A verdict was rendered for the plaintiff, and in due time the defendant filed a motion for a new trial—assigning as reasons:

1. The admission of evidence which ought to have been excluded. 2. The exclusion of evidence that ought to have been admitted. 3. Misdirection in giving instructions. 4. Error in refusing instructions prayed by the defendant. 5. That the verdict is against law and evidence.

The court overruled the motion, and the defendant excepted.

Judgment being rendered for the plaintiff the defendant appealed.

GEYER, for appellant.

The act of Congress of the 13th June, 1812, operates as a grant of the commons to the inhabitants of St. Louis in full property, if they are capable of taking by that description, and vests no interest in any municipal corporation.

It has been repeatedly held by this court, and by the supreme court of the United States, that the act of 1812 is a grant vesting the title by its own force, leaving the extent and boundaries to be judicially ascertained by evidence *aliunde*. *Bird vs. Montgomery*, 6 Mo. R. 510; *Mackey vs. Dillon*, 7 Mo. Rep. 7; S. C. 4th How'd, 448; *Chouteau vs. Eckhart*, 7 Mo. R. 16, S. C.; 2 How'd, 376; *Les Bois vs. Brammell*, 4 How'd, 449.

If therefore the grant to the inhabitants of St. Louis is void for uncertainty, the title of the appellee fails altogether since the title could not vest in the corporation by the terms of the grant.

II. If the title became vested by the act of 13th June 1812, it could not afterwards be in any way affected by the legislation of Congress. On that day the property became exclusively subject to the laws of the State of Missouri. Congress could not delegate to the Legislature of Missouri any authority to dispose of the property, and consequently no new power was conferred by the act of 27th January, 1831.

The United States having been divested of all interest by the grant, could not exercise any control over the subject. *City of N. O. vs. Cumas*, 9 Peters, 224; *Fletcher vs. Peck*, 6 Cran. 87. It is an acknowledged principle of law, that the title and disposition of real property is exclusively the subject of the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. *Kerr vs. Deusses of Moon*, 9 Wheat. 565, (5 Con. Rep. 882); *McC. et al. vs. Sul. et al.*, 10 Wheat. 192, (6 C. R. 71.)

III. Private property is not subject to the will and caprice of the Legislature. That government can scarcely be deemed to be free where the rights of property are left solely dependant upon the will of the Legislative body without any restraint. The fundamental maxims of free government require that the rights of private property should be held sacred—at least no court of justice would be justified in assuming that the power to violate or disregard them lurked under any general grant of legislative authority. *Wilkinson vs. Leland*, 2d Peters, 657; *Van Haus Lessee vs. Dorrance*, 2 Dall. 304; *Society, &c. vs. New Haven*, 8 Wheaton 464.

The act of 1835 is not to be construed into a power, to the mayor and aldermen to dispose of the property of the inhabitants in the commons at pleasure, if such construction may be avoided, and another adopted which is consistent with the constitution and the vested rights of the owners of the property. The act is in derogation of the common law, and is to be construed strictly. *Sharp vs. Spier*, 4 Hill 76; *Sharp vs. John*, ib. 92; *Taylor vs. Porter*, ib. 140; *Quachenbust vs. Danks*, 1 Den. 128; 7 Mass. 523; *Dash vs. Dankleek*, 7 Johns. Rep. 477

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Sayre vs. Wesner, 7 Wend. 661; Garrell vs. Doe, 1 Scamner 337; Commonwealth vs. Jarrot, 7 S. & R. 460; case of St. Mary's Church, ib. 517.

IV. A power of sale, like all other powers, can be exercised only in the mode, and subject to the conditions, if any, prescribed by the instrument creating the power. Wright vs. Wakeford, 17 Vesey, 454. Thus if a sale be directed to be made with the consent of a tenant for life, or of any other person, the consent must be obtained before the exercise of the power. Mortlock vs. Buller, 10 Vesey 308.

Where there is a condition precedent to the exercise of a power, no sale under the power can by possibility be sustained, unless the condition be performed. 2 S. & P. 43, 9th Ed. Deke vs. Recks. Cro. Ca. 335; 2 S. vs. Pow. 497, 6 Ed. Doe vs. Master, 4 T. R. 39; Little vs. Frost, 3 Mass. 106; H. on trustees 478.

V. The deed executed by the Mayor furnishes no evidence and still less constructive proof of a compromise made in pursuance of the power. It does not even recite the existence of any authority from the board of aldermen to make the deed, or that a compromise was made by the mayor and board of aldermen, by which the land described and purported to be conveyed was to be conveyed to any person. Little vs. Frost, 3 Mass. 106; Galer vs. Commissioners, 1 B. 354.

VI. It is proved by the records of the proceedings of the board of aldermen that no such compromise was made—but in fact the only conveyance authorized did not embrace the land in controversy, which was at the time claimed by another person.

VII. The evidence offered by the defendant was competent and ought to have been admitted. 2 Starkie, 1020, 1021, 24-25-26, 1044. If the deed is prima facie evidence of the authority to execute it, yet it was competent for the defendant below to rebut the presumption by showing that the aldermen did not assent to or authorize the deed. The Mayor, &c., Colchester vs. Lanton, 1 Vesey & B. 245; case of St. Mary's church, 7 S. & R. 530.

GAMBLE & BATES, for appellee.

1. The deed of the corporation of St. Louis under the corporate seal implies the authority of the officer executing it. 1 Ky., 268; 15 Wendall 25; 6 S. and R., 12; 3 Halst., 183; 4 Yerger, 7.

2. The —section of the act of January, 1835, gives full power to compromise and settle with adverse claimants in any mode for any consideration, either by receiving payment from them for land or making payment to them for their claims and that in money or land, or by any other mode of adjustment, and therefore it was not necessary to the validity of a compromise that the party receiving a deed should have had an adverse claim to the land conveyed to him.

3. There being no evidence of the extent of Dillon's or Dent's claims, the resolutions of the board would authorize a conveyance to Morton of any land embraced by the claim of either of those individuals if made with their assent either written or verbal.

4. As the act requires no particular evidence of an adverse claim in order to a compromise, Page as the purchaser of Morton's title under judgment and execution is not bound to go behind the deed to Morton to show what adverse claim, Morton had, nor is such adverse claim a part of his title.

NAPTON, J., delivered the opinion of the court.

There is no question, but that the instruction given by the court for the plaintiff was correct, so far as it determined the relative value of the Mackay claims and the title of the inhabitants of St. Louis to the St. Louis common.

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Whether Page, the plaintiff, or Morton from whom he purchased, has the legal title from the city, is the only matter controverted. Morton has a deed regular on its face from the city of St. Louis under its corporate seal. His title is so far *prima facie* good. The defendant proposed, on the trial, to go behind this deed and attack its validity in various ways.

1. He contended, that the plaintiff must show that a majority of the citizens of St. Louis had voted for the sale of the commons under the act of our legislature in 1835.

2. He denies the constitutionality of the act of the legislature in 1835, authorizing the sale of the commons.

3. He denies that the mayor and aldermen had any authority to make this deed. For this purpose he produces the Mackay title—a deed from Mackay's widow to one Arund Rutgers, in 1825, for 23 arpens of this claim, including the land in controversy. A sheriff's deed to one Blaisdell, by virtue of an execution against Makay's executrix, containing 15 19-000 acres, which last mentioned tract does not include any part of the land in controversy; a deed from Blaisdell and wife, to White & Gorman, and a deed from White & Gorman to George Morton. The records of the proceedings of the board of aldermen of St. Louis are then produced, showing, that on the 2d April, 1836, the committee on the commons reported a recommendation of a compromise of the Mackay claim. The basis of said compromise was for the city to convey their title to Mackay's representatives, upon the latter paying \$20 per acre. A resolution of the board is accordingly adopted as follows: "Resolved, That P. M. Dillon, George Morton and Fred. Dent, being the legal representatives of J. Mackay, shall receive deeds for the lands claimed by them, within the commons, by paying \$20 per acre, &c." The defendant then offered to prove that Morton had no claim, and made none before the board or committee, except the one he bought of White & Gorman.

It seems, that Morton's deed from the city embraces the Rutgers tract, as well as the 15 acres he claimed through Blaisdell. The object of the testimony was therefore, to show that the deed of the city was unauthorized—that the corporate authorities had no power to sell under the law unless at public sale, except by way of compromise, and it was contended that the transaction with Morton was not a *bona fide* compromise, within the powers of the city authorities.

The first point, we are clear, is not tenable. The city of St. Louis in disposing of her commons under the act of our legislature does not occupy the position of a mere trustee. The rules which govern this

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class of agents do not apply to the city authorities. A deed by a trustee, under a special power, must recite the power, and show on its face that the contingency has happened which would authorize the sale. The municipal corporation of St. Louis occupies a different position, more analagous to that which the United States does as a great landed proprietor. When a deed from the United States is produced, the grantee is not bound to show that all the prerequisites of the law have been complied with. It is not incumbent on him, when he produces his patent, to prove that the land was surveyed—and that it was duly proclaimed for sale by the president—and that it was offered for sale at public auction. These are preliminaries to a patent which the law requires, but the production of the patent raises the presumption that these preliminary acts have been duly performed. Nor will our courts hear any objection from the opposite party, on account of a defect in these prior proceedings, unless that party holds a conflicting title from the same source. If the United States are satisfied, we have not considered it our duty to permit a mere trespasser to complain.

The objection founded on the denial of the power of the legislature of Missouri to pass the act of 1835, was not pressed in the argument and we shall not therefore go into that branch of the case.

The principal difficulty in this case is in determining how far a stranger can be permitted to enquire into the validity of the deed which the corporate authorities of St. Louis have made to Morton. One of two propositions seems to be the result of the proof offered. Either the city of St. Louis still owns this Rutgers tract of 23 arpents, or Morton has the legal title.

If the effect of the proof is to show title in the city, we think it was properly excluded, upon the same principle which has authorized the rejection of such evidence in attacking a patent from the United States.

If Morton has the legal title, the equitable rights of Rutgers' heirs are not a proper subject of investigation in this action.

The construction which has been urged at the bar to the recorded action of the city authorities is not necessarily involved in this judgment. Neither the resolution of the board of aldermen, or the report of the committee upon which it was based, intended to authorize the relinquishment of the city title to any person who had no claim. To give Morton all the land he claimed, and 15 acres which he did not claim, was not in my opinion, a compromise of claim within the true intent of the resolution. Such a course was virtually selling to Morton 15 acres in the common at \$20 per acre, at private sale. This the board of aldermen clearly had no power to do.

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But on the other hand Morton may have represented Rutgers or his heirs, by purchase or private arrangement, and if so, his legal title would be but a trust estate, so far as the Rutgers tract is concerned. Whether this tract was included in Morton's deed with the consent of the owners or by their subsequent ratification, it is manifest that a court of equity would compel a conveyance upon just terms. But the rights of the parties, upon such a hypothesis, could not be settled in an action of ejectment. Morton has paid his \$20 per acre for the whole tract, including the Rutgers claim. If he be held a trustee for the heirs of Rutgers, they would of course have to compensate him for his advances.

Morton undoubtedly had a claim for 15 19-100 acres, and was entitled under the resolution to a deed to this extent. To hold the deed void at law would sweep away the whole title, and leave it in the city, who is not a party to this ejectment.

Judgment affirmed.

 THOMAS HAILE vs. ROBERT J. HILL, ET AL.

1. Plaintiffs were entitled, under the will of their father, who died in the State of Louisiana, to certain slaves after the death of their mother who owned a life estate in them. Their mother owning a life estate instituted suit against defendant to recover the possession of the slaves and joined the names of the plaintiffs with her's in the suit. Judgment was rendered for the defendant. Their mother being dead, plaintiffs now sue in detinue to recover the slaves. Held that the judgment thus rendered against plaintiffs is no bar to their right to recover; that such judgment only concluded those who had a right to sue.
2. A witness who is interested in a suit is competent to testify when called upon by a party claiming against his interest.
3. A party is not bound to read the whole of a record offered by him in evidence, but only such parts as he may deem necessary to prove the facts which he desires to establish; the opposite party has a right to have the balance read or such parts as he may deem material to his side of the question.
4. The probate of a will in another State is to be regarded as a "judicial proceeding" to the record of which "full faith and credit" is to be given when certified conformably to the act of congress of 1790.
5. In an action of detinue to recover a slave, if the slave dies before judgment, the measure of damages is the use and hire of the slave up to the time of his death.

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APPEAL from Madison circuit court.

SCOTT & FITZGERALD, for appellant.

1. The circuit court erred in sustaining the demurrer of the plaintiffs below to the fifth plea of the defendant below. 2 Chit. Pl. 438; 1 Saunders 92 and note 3; 1 Mo. Rep. (old edition) McKnight vs. Taylor, 202; 1 Starkie Ev. 221, 223, also 222, 223 and notes, also 219 and notes.

2. The circuit court erred in permitting to be read to the jury as evidence a paper purporting to be the will of Ferguson Haile, together with the papers accompanying it. Story's Confl. Laws, page 391, sec. 465, also page 394, sec. 468, also page 215, sec. 260, also 527, sec. 636; 2 Harris and John. 191, 195; 3 Gill and John. 234, 242; Civil Code of 1825, page 504 art. 1567; also page 606, art. 1577, also p. 506, art. 1580-81, also page 510, art. 1588; 5 Mo. Rep. 403, Haile vs. Palmer and wife; 1 Stark. Ev. 184, note 3; 8 Mo. Rep. 421, Bright et al. vs. White; Civil Code, page 478, arts. 1480, 1481, 1482, also pages 516 and 518, arts. from 1609 to 1616; Story's Con. Laws, page 396-7, sec. 471; Butler's N. P. 298.

3. The circuit court erred in permitting to be read in evidence to the jury two books purporting to be general digests of the acts of the legislature of Louisiana, printed in 1828, also two other books purporting to be the acts of the first and second sessions of the first legislature of said State, printed in 1846 and '47, also a book purporting to be the "Civil Code" of said State, printed in 1838, also a paper purporting to be an act headed "Civil Code," approved March 31st, 1808. 7 Mo. Rep. 22, Hite vs. Linhart; 2 Stark. Evid. 331; note 2; 1 Stark. Evid. 248, 249; 2 Stark. Ev. 331; title "Foreign Laws"; 1 Peter's Rep. 229, Consequa vs. Willings; 1 Johnson Rep. 385, Kinney vs. Clarkson; Story's Con. Laws, 224, sec. 269; Rev. Code of 1845, page 466-7; 8 Mo. Rep. 421, 426, Bright et al. vs. White; Story's Con. Laws, page 201, sec. 242; also page 203, sec. 243; also page 219, sec. 263; also page 232, sec. 278, also page 299, sec. 362 and forward to sec. 557; 9 Mo. Rep. 56, Broadhead vs. Noyes; also 157, Dorsey vs. Hardesty.

4. The circuit court erred in permitting to be read to the jury as evidence a paper purporting to be the deposition of Elizabeth Haile, and in refusing to permit the defendant below to prove her to be interested in the suit. 1 Dallas Rep. 273, 275; Starkie Ev. 102, 103, 104 and notes.

5. The circuit court erred in permitting to be read to the jury as evidence of the confessions of Thomas Haile, a paper purporting to be a transcript of a record on petition had in the State of Louisiana, and in refusing to permit the defendant below to make and file his affidavit that he had not instituted said suit or caused it to be instituted. Peak's ev. 56; Salk Rep. 154; Buller's N. P. 236-7; 1 Starkie Ev. 285-6 and note; 7 Tenn. Rep. 3; Roscoe's Ev. 105; 10 Mo. Rep. 621, Hall vs. Guthrie; Peak's Ev. 54; Buller's N. P. 235; 6 Mo. Rep. 435, Keith vs. Wilson; 1 Mo. Rep. (old edition) 744 Bank of Mo. vs. Scott; 2 Starkie Ev. 42 and notes; 4 Mo. Rep. 82, Cozens vs. Gillespie; Roscoe's Ev. 57; 1 B. & A. 182, Henneel vs. Lyon.

6. The circuit erred in permitting to be read in evidence to the jury so much of a certain transcript of a record and proceedings of a suit heretofore determined, in which Martin and Lucy Palmer were plaintiffs, and Thomas Haile was defendant, as related to the names of the parties, the title thereof, and how it had terminated. 1 Starkie Ev. 214; 2 Starkie Ev. 214, and cases cited; Gilbert's Law Ev. 31.

7. The circuit court erred in refusing to permit the defendant below to read in evidence to the jury the record last referred to, and after the plaintiffs below had read portions of the same, the said court erred in refusing to permit the said defendant to read the rest and residue of the same. 2 Mo. Rep. 54 Hempstead vs. Stone; 1 Stark. Ev. 222; 8 Mo. Rep. 120, Offlet vs. John (mulatto); 2 Stark. Ev. 707, 708, &c.; 1 Chitty's Plead. 472; 2 Story's Rep. 733;

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1 Chitty's Plead. 222; 1 Mo. Rep. 341, *Chamberlain vs. Smith*; Stark. on Ev. 214 and note n, also 215, also 222, 223; 5 Esp. Cases 59; Peak's Ev. 29; Buller N. P. 227, 228, 235; Peak's Ev. 34, 35; 1 Stark. on Ev. 188-9, note 2.

8. The circuit court erred in giving the seven instructions prayed for by the plaintiffs below, as preserved in the bill of exceptions. As the instructions given by the court relate to and are mostly connected with the errors referred to, the court are referred to authorities already cited in this brief, also 1 Mo. Rep. 225.

9. The circuit court erred in refusing to give eleven of the twelve instructions prayed for by the defendant below.

COLE, for appellant.

1. The court below erred in excluding the 5th plea of appellant.

2. That instructions 6 and 7 confess the fact, and decide that the will of Ferguson Haile did not disinherit Thomas Haile, appellant. Taking this decision of the court to be true, and also as an admission of appellees, the appellees cannot recover in this action, having neither an exclusive right of property, nor a right to immediate possession in the property in suit.

3. The court below permitted the agreement of the parties to go in evidence to the jury on the part of appellant, but erred in instructing that evidence away. If it was legal evidence it should have remained with the jury, if otherwise, it should have been withdrawn. Under the instruction it was evidence and not evidence—an embarrassing affair for the jury, and a wrongful one for the appellant.

4. There were two grounds of legitimate defence to the plaintiff's action. First, That appellant was an heir of Ferguson Haile by the laws of Louisiana to the slaves in controversy, and entitled to a share thereof with the other heirs. The action of detinue could not be sustained under such a state of facts, and the plaintiff would have been non-suited. The appellees have been non-suited. The appellees have mistaken their remedy, if indeed they have rights. Secondly, The deed of compromise entered into by appellant and appellees, before the commencement of this action, contains technically a contract, founded upon a valuable consideration, by which the appellant acquired an interest in these slaves, and at the same time acquired a right to retain the possession thereof until the agreement was complied with according to the true intent and meaning thereof. This state of things pre-existing, precludes a recovery in this action.

5. Lucy Haile, widow, had an unfettered right under the will of her husband, to dispose of the estate as she pleased. One mode of alienation known to the law is that by the judgment of a court of record. The judgment of Thomas Haile against her for the property in suit, is as operative against her and those claiming in this suit, as if she had adopted any other mode of alienation, to wit: by sale, gift, grant, &c.

6. The agreement of the parties to the suit contains a clear and decisive admission of right in Thomas Haile to one-sixth part as heir, and also to payment for money advanced, services rendered, &c. The office of the referees was not to ascertain rights, but to provide the way and means of compensation by money, slaves, &c., to Thomas Haile, out of the estate.

GARLAND, FRISSELL & JOHNSON, for appellees.

The court did not err in admitting all the volumes of Louisiana law, offered by the plaintiffs. By them the court must presume (as nothing appears to the contrary) that it was shown that the will of Ferguson Haile was properly proved and admitted to probate. It is not for this or any other court to attack that will collaterally—having been admitted and established by the proper tribunal; it must stand in full force and virtue as the will of Ferguson Haile, until annulled or reversed by the same or an appellate court. See *Gaines' case*, 2 Howard, 619:

"A court of equity will never put itself in the place of the arbitrators, and unless an award

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has been actually made, a court of equity will not decree performance of the intention of the arbitrators." See Watson on arbitration and award, page 229, and authorities there cited—Milnes vs. Grey, 14 V. 406 et seq.; Blundell vs. Brittargh, 17 V. p. 241.

Judge BIRCH delivered the opinion of the court.

In the year 1831, Ferguson Haile died in the State of Louisiana, having previously made a will, whereby after reciting that he had given to his two children by a former marriage (naming them, and the plaintiff in error being one) all he was able or intended to, his remaining property is devised to his wife Lucy and her children, (by him) to be used and disposed of by her for their maintainance and education during her life, and to be equally divided amongst them at her death. The will was admitted to probate, and the widow administered on the estate, the controversy concerning which will be noticed hereafter. In the spring of 1832 the defendant below, who was one of the children of the first marriage, took certain negroes thus devised from the possession of his step-mother and her then husband, Martin Palmer, with whom she had recently intermarried, brought them to this State, and has assumed ever since to hold them as his own. Palmer and his wife followed the defendant to Missouri, and commenced an action of detinue against him for the negroes now again in suit; the declaration reciting, and one of the counts confirming to each of the said relations, that Mrs. Palmer sued as well in her own right as that of trustee for her children, who were plaintiffs below and appellees here. That suit was a long time on the docket of the circuit court, came to this court, was sent back, partially compromised, and appears to have been finally wound up upon the record by an entry of a general judgment against the plaintiff.

The first and most material question, therefore, is the one which is raised by the action of the circuit court, in sustaining the plaintiff's demurrer to the defendant's plea of former recovery; and as that plea made profert of and was determinable alone by the terms of the will, as denoting the condition of the estate sued for, we have looked into it narrowly with a view to the solution of the question in issue, and find the estate to have been demised and limited substantially as stated in the preceding paragraph.

We are of opinion, therefore, that as the bequest to the present plaintiffs was but an estate in *remanencia*, to be enjoyed after the particular estate of their mother, they were at least not concluded by the fact that they were personated and joined in an action for her benefit, during her life, which resulted in the judgment which it is alleged was ren-

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dered against them. The circuit court, therefore, committed no error in sustaining the plaintiff's demurrer to the defendant's fifth plea.

In reaching the foregoing conclusion, we have thrown out of view, in considering the record upon which the plea was founded, all that has been alleged respecting the unfairness whereby a judgment of recovery, instead of a judgment of dismissal, was entered by the clerk. If the parties who are plaintiffs in this suit, had been in condition to sue and conclude themselves in the previous suit, we apprehend their only remedy would have been against the attorney or the officer who committed the wrong. The impolicy of permitting a record to be impugned, either in the manner suggested by the plaintiffs in reference to the judgment in the former suit, or by the defendant in reference to the one commenced by him in Louisiana, need only be reflected upon to be conceded. There is a process whereby to correct such errors; but as it has been resorted to in reference to neither of the suits in question, we need but add that the proceedings which the records respectively exemplify, must stand together upon the same general principle, but with different effects. The one from Louisiana being between parties who had a right to sue, must be regarded, to the extent it goes, as conclusive between them; whilst the one in our own State in like manner concludes those who had the right to sue, but no others. We find no error then in the decision of the circuit court, whereby the plaintiff in error was estopped from denying, even though under oath, in this action the facts established against him by the record of the court in Louisiana; though in the view we have taken respecting the question of evidence which have been raised by the counsel for the plaintiffs here, the admission or rejection of the record of the suit in question, would be of comparatively subordinate importance.

By the second section of our *present* "act concerning evidence." "the printed statute books of sister states, and the several territories of the United States, purporting to be printed by the authority of such states or territories, shall be *evidence* of the legislative acts of such states or territories." And by the sixth section of the same act, "the printed volumes purporting to contain the laws of a sister state or territory, shall be admitted as *prima facie* evidence of the statutes of such states and territories."

Regarding the "printed volumes" which were read by the plaintiffs, and objected to by the defendants in the court below, as at least answering the legislative requisition as to what "shall be admitted as *prima facie* evidence," and no attempt having been made to rebut the presumption thus authorized respecting their validity, we think the cir-

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cuit court did right in permitting them to be read as evidence, (until better was adduced) of what the laws of that State was upon the questions arising in the cause compared with the convenience resulting from such a practice, (the motive doubtless which led to the legislative permission,) no corresponding hardship or injury need result from it; for even in the present case, which is probably as strong an one as can be imagined, if the defendant *really* supposed that the laws of Louisiana, as read from the printed books procured by the counsel for the plaintiff, were either misprinted or had been repealed, his affidavit to that effect might well have been entertained as a ground for a new trial. Unless something like this be done, the practice is deemed a safe and convenient one to permit such laws to be read, and a verdict founded upon them to stand.

Independent of the modification of one of the rules of evidence, intended by the 26th section of the 7th article of the "practice at law" act, we concur in the reasoning of the counsel for the appellees, respecting the deposition of Elizabeth Haile. She was the widow of the other son of the testator's first marriage, and her interest consequently, if presumed to have any, was against the party calling her. It does not indeed appear, by the manner in which the point is made upon the record, that the defendant even offered to prove that she had any other interest—the language simply being that he offered to prove "the interest of the witness." Had it been otherwise, however, we are not prepared to say, especially without knowing what she had sworn in her deposition, that we would review the discretion of the circuit court in permitting it to be read. Her testimony may have been cumulative merely, or otherwise ineffective to influence either the one way or the other the *final* finding of the jury; and to all this was superadded her own oath, as part of her deposition, that she had no interest in the cause.

In reference to the ninth assignment of errors, we think it was competent and proper for the plaintiffs to read such portions of the record of the suit of Palmer and wife against the defendant, as were deemed pertinent to the fact or facts they desired to establish, and it may have been the right of the defendant to have had the balance of it, or such other parts as were deemed material to his side of the question, read also to the jury. It is deemed sufficient to state, however, in reference to that question, (embraced in the 10th and 11th assignment of errors) that no such point was made or included in any of the reasons assigned for a new trial, and that it need not consequently, be further considered here. The 2d section of the 7th article of the "act to regulate

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the practice at law," and the early, continuous and recent (*Long vs. Story*) exposition it has received from this court, renders a repetition of the reasoning unnecessary.

This, we believe, disposes of all the material questions in the case, except such as arise upon the instructions, or have relation to the weight of the testimony. The first instruction, given at the instance of the plaintiff, was in these words :

"1. That the will of Ferguson Haile, in evidence in this cause, having been admitted to probate under the laws of Louisiana, by its terms, vests in the plaintiffs after the death of Mrs. Palmer, the right to all the property of which he died seized, that had not been legally disposed of by the widow, under her power and duties under the will."

Casting out of view the question of the admissibility of the Louisiana books as evidence of the Louisiana laws, this instruction may have been well predicated upon the ground assumed by this court in the case of *Bright et al. vs. White*, (8 Mo. 421.) Although the cases are not deemed parallel in the respect assumed by the counsel for the plaintiff in error, (our statute respecting evidence having been since changed) the probate of a will was regarded in that case as a "judicial proceeding," to the record of which, "full faith and credit" was to be given, when certified as this is, conformably to the act of Congress of 1790.

No testimony appears to have been offered in the court below upon the question of *fact*, as to whether the ancestor of these parties had or had not advanced to the children of his first marriage a proper portion of his estate. Under our law, that would surely have been necessary to invalidate the recital in the will itself; so that in that respect the second instruction was well enough, conceding even that the validity of the will should be attacked in such a manner.

Waiving, therefore the further consideration of that proposition, it is deemed sufficient to remark in reference to the alleged laws of Louisiana, which are relied upon (amongst other things) to establish the disinheriton of the plaintiff in error, that it no where appears in the record that the defendant offered any such laws *in evidence*, and that as we are not presumed judicially to *know*, so we are not authorized to judicially *assume* that any such laws were contained in the books offered in evidence by the plaintiff. On the contrary, such a fact must be in some manner apparent from the record, whereby this court must not only itself see, but it must likewise be apparent that the circuit court has seen, in evidence such foreign laws as are here relied upon to overturn its decisions. Unless this be done, the legal presumptions must be in favor of the regularity and legality of the judicial proceedings we may

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be called upon to review. And this may be held to cover almost the entire ground of controversy respecting the probate of the will in Louisiana, and the action of the circuit court consequent upon it. In any view of the case, therefore, the second and sixth instructions are entitled to stand.

The 3rd, 4th and 5th instructions, given at the instance of the plaintiffs, so well and clearly comprehend and announce the law in respect to the agreement to arbitrate the matters in dispute in the former suit, as to need no comment or elucidation. They are as follows:

"3. That a guardian cannot, under our laws, dispose of the future or contingent interest of his ward, and the act of Franklin Murphy guardian of Ferguson Haile, Jr., in signing the agreement which affected his future rights to the negroes in controversy, having been done while Lucy Palmer was living, is void, confers no right upon Thomas Haile, and divests Ferguson Haile (the plaintiff) of no rights of property."

"4. That the agreement of November 27, 1844, on the face of it, and through all its parts, appears to have been an agreement to arbitrate certain matters in controversy, and having failed to be executed as such, it cannot be construed into a contract binding upon the parties independent of an award."

[The court might well have refused the jury this paper, but having permitted it to be read, at the instance of the defendant, he cannot be heard to complain that the jury were properly instructed respecting its legal effect.]

"5. That the right of possession of Thomas Haile, to any of the negroes under the agreement in evidence, is dependent upon their being valued by the referees named in the agreement, and as no valuation has been made by them, nor can be made, Haile cannot retain possession against the plaintiffs."

Whilst the last instruction of the court seems to us erroneous, it is proper to remark that it appears to have in its support not only the technical sanction of the pleadings, and the judgment contemplated by this action, but also the preponderance of previous adjudications, so far as we have been enabled to consult them. The reasoning and the right, however, seem to us the other way; and that a proper finding in such a case as this would be the special fact of the death of the slave, as a reason why no value was affixed by way of alternative judgment, leaving the use and hire, up to the period of the death, to constitute the measure of damages.

The clerk of this court will be directed, therefore in accordance with the conditional authority on file for that purpose, to enter, along with

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the judgment of affirmance a remittitur of five hundred dollars, that being the value of the slave Charles, at the time of instituting the suit, as erroneously found by the jury, and for not having entered this remittitur in the court below, the defendants in error will of course be taxed with the costs of this appeal.

In reference to the rest of the case (the relevant and unambiguous instructions which were refused to the defendant being confessedly but the counterpart of those that were given for the plaintiffs,) no such error or irregularity in the record is perceived as to call for further correction; and judge RYLAND concurring in this opinion the judgment of the circuit court is consequently affirmed.

NAPTON, J., dissenting.

JOHN SIGERSON vs. POMEROY & ANDREWS.

1. A factor must strictly follow the orders and instructions of his principal, and a departure from them will be at his own risk. If he does with proper care and diligence, faithfully and *bona fide*, carry out the orders of his principal, and yet a loss accrues, it must fall upon the principal.
2. Whether a factor obeys or disobeys the instructions of his principal is a question of fact for the finding of the jury.
3. An instruction which is calculated to mislead the jury by withdrawing from their inquiry material facts, is improper, and it is good cause for reversing the judgment.

APPEAL from the St. Louis Circuit Court.

STATEMENT OF THE CASE.

This was an action of assumpsit by the appellees against the appellant. Common counts for money had and received, and for money paid, laid out and expended. Plea the general issue provided by Statute of 1847.

At the trial the case appeared to be, that the plaintiffs were commission and forwarding merchants in the city of St. Louis, and had advertised that they would ship goods to New Orleans, Liverpool, and other places; that the defendant in 1848, at different times from the first to the 18th of April, delivered to the plaintiffs, lard, pork and bacon, worth over \$3000, to be shipped and sold, a portion thereof, in New Orleans, and 386 barrels of lard in Liverpool, upon the whole the plaintiffs advanced to the defendants over \$7000, \$4000 of which was advanced upon the

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lard destined for Liverpool, and 24 barrels of other lard. That destined for Liverpool, was worth in St. Louis \$4995 63. (The plaintiffs also received of the defendant in money and other goods about \$1300.)

The plaintiffs shipped the goods to the commercial house of Andrews & Brother in New Orleans, which house was then in good credit. About the time of the shipments, both the members of the house of Andrews & Brother committed suicide, and that the administration of their estates was not yet closed, but the estates were generally regarded as insolvent.

The lard directed to be shipped to Liverpool was so directed in writing in these words: "Messrs. Pomeroy & Andrews, Gents. I herewith hand you dray tickets and invoice for 410 barrels of lard, 386 of which is a prime article and in fine order, and which I wish sent forward direct from New Orleans to Liverpool, provided your correspondents are in a situation to do that kind of business and have correspondents that they are satisfied will protect their and our interest." This direction was in the form of a letter, and signed by the defendant.

The plaintiffs on the same day wrote to Andrews & Brother enclosing a copy of the defendants instructions and a bill of lading of the lard, and stating that if they could negotiate they would have to advance about \$4000 on that shipment, and also stating that if it could be shipped to Liverpool and drawn upon by Andrews & Brother, so as to make their (the plaintiffs) advance good with all charges for receiving and forwarding, they had better send it through as the defendant was very anxious to have it sent to Liverpool. Andrews & Brother wrote to the plaintiffs in reply that they offered the lard to all those to whose houses in Liverpool they would ship, and they would not any of them advance over three cents per pound (which rate by other testimony would have amounted to about \$2550 96.) Andrews & Brother then sold the lard in New Orleans. The defendant gave evidence tending to prove that if the lard had been shipped to Liverpool he would have made a large profit thereon.

There was no evidence of what was done with the other goods shipped to Andrews & Bro.

It was proved that there was an arrangement between the plaintiffs and Andrews & Brother, that on all consignments made by the plaintiffs to Andrews & Brother, the plaintiffs should receive a portion of the commissions made by Andrews & Brother on such consignments—(one witness, the plaintiff's book-keeper, stating the plaintiff's portion to be one per cent., the whole commission of Andrews & Brother being two and a half per cent., and another witness stating his belief that the portion of the plaintiffs was one-half of the whole commission received by Andrews & Brother,) and this was the plaintiff's only compensation for their services, they making no other charge in St. Louis for shipping, advancing, &c. It was a part of the arrangement that the plaintiffs might draw upon Andrews & Brother for advancements made upon consignments to them. It was proved to be usual to charge a commission for shipping and advancing distinct from that charged for receiving and selling at the port of destination.

It was proved that the plaintiffs raised all the money which they advanced to the defendant by negotiating bills which they drew on Andrews & Brother against the shipments of defendant's goods. And it was not proved that the plaintiffs had paid any of those bills or were liable to pay them further than that a banker held some bills drawn by the plaintiffs on Andrews & Brother, and looked to the plaintiffs for payment of them, but these bills were not described by numbers, dates, amounts, or in any other way. It was not proved that Andrews & Brother had not paid any of the bills drawn against Sigerson's goods. Nor was it proved that by reason of the alleged insolvency of Andrews & Brother, the goods or their proceeds had been lost to the plaintiffs.

It was also proved that the plaintiffs, acting for Andrews & Brother had agreed with the defendant to buy of him a quantity of pork for Andrews & Brother, and had paid him, on account thereof, \$3,500, and received of him 275 barrels of pork, valued at \$1848 69, and claimed of the defendant a balance on that account of \$1651 31, and this balance was included in the verdict rendered for the plaintiffs, as appears by the amount thereof.

There was some inconclusive evidence given of the custom of commission merchants as to their liability for the solvency of their consignees.

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The court then, upon motion of the plaintiffs, instructed the jury as follows :

1st. That by the general law of the land, commission and forwarding merchants, like other agents, are required to follow the directions of their principals, to act with good faith, and with ordinary care, skill and diligence in regard to the business committed to them by their principals, and if, notwithstanding a compliance with these duties losses occur in such business, such losses must be borne by the principal, and the commission or forwarding merchant is not responsible.

2d. If the jury find in the present case that the plaintiffs, in carrying out the orders of the defendant, sent forward the defendant's produce to the house of Andrews & Brother, in the usual course of business; that the last mentioned house was then in good credit, and the plaintiffs had no reason to doubt its solvency, and afterwards the proceeds of such produce were lost through a violation of defendant's orders on the part of Andrews & Brother, or by reason of their insolvency; then the plaintiff's are not responsible to the defendant for such loss and are entitled to recover of him in the present action the amount of their advances on such produce.

3d. The jury is further instructed that there is no evidence before them tending to show any local usage or custom at St. Louis in regard to the duties or responsibilities of commission and forwarding merchants different from the general law, the jury will therefore entirely disregard the evidence of witnesses as to their opinion of such duties and responsibilities, and decide this cause according to the general law as explained by the court.

4th. The jury are further instructed, that the circumstance of the plaintiff's having made an arrangement with the house of Andrews & Brother, by which the plaintiff's were to receive one per cent. on the amount of sales of such produce as might be consigned by the plaintiffs to Andrews & Brother, does not make the plaintiff a partner in the house of Andrews & Brother." To which the defendant excepted.

The court, upon motion of the defendant, instructed the jury as follows :

1st. If the jury believe from the testimony that Pomeroy & Andrews failed to comply with the instructions of Sigerson as to the disposition of the goods delivered to them for shipment and sale, or part of said goods; and if a loss happened in consequence of such failure, then Pomeroy & Andrews are liable to Sigerson for such loss, and cannot recover the amount of their advances on such goods until they have paid to Sigerson the amount of such losses.

2d. The jury is instructed that if Pomeroy & Andrews made advances to John Sigerson upon property put into their hands for shipment and sale, although both the property and Sigerson are liable to them to repay their advances, still Sigerson is only liable after the fund which was raised, or might have been raised by proper diligence of Pomeroy & Andrews out of the property shall have been exhausted; and if Pomeroy & Andrews have failed to use due diligence in the shipment and sale of said property they cannot recover advances made upon it from John Sigerson.

The defendant also moved the court to give to the jury the following instructions, which the court refused to give, to which refusal the defendant excepted.

1st. The jury is instructed that if Pomeroy & Andrews and Andrews & Brother were jointly concerned in the shipment and sale of property put into the hands of Pomeroy & Andrews, by John Sigerson, or were jointly interested in the profits of such shipment and sale, then the insolvency of Andrews & Brother, after they had received the property, does not give to Pomeroy & Andrews a right to recover of John Sigerson the advances which they made to said Sigerson upon said property, but if a loss occurred in consequence of such insolvency, then John Sigerson may recover of Pomeroy & Andrews the sum which would have been the net proceeds of said property if Sigerson's instructions in reference to it had been obeyed.

2d. If Pomeroy & Andrews made advances to John Sigerson on account of property delivered to be forwarded for a market, and the money advanced was raised upon bills drawn by P. & A. against said property, they have no right to recover against Sigerson for said advances, without showing to the jury that they have paid, or are liable to pay, those bills.

3d. If Pomeroy & Andrews made advances of money to John Sigerson on account of the

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property mentioned in the testimony, and they raised the money for the advances by drawing bills on their consignees in New Orleans, and negotiating the same, they have no right to recover from Sigerson the amount of the advances without showing that the said bills or some of them have been dishonored, and that Pomeroy & Andrews have paid, or are liable to pay, the amount of same.

4th. Unless the jury believe from the testimony that Pomeroy & Andrews have actually lost money, and are out of pocket by their advances made to Sigerson the jury ought to find for the defendant.

The jury rendered a verdict for the plaintiffs for \$6883 84.

The defendant moved for a new trial.

Upon the hearing of the motion for a new trial, the plaintiffs remitted \$117 of the verdict, and the motion for a new trial was overruled, to which the defendant excepted.

—, for appellant.

I. Pomeroy & Andrews did not entitle themselves to recover of Sigerson their advances to him, by showing the insolvency of their consignees, (and this without reference to the particular arrangement between them and Andrews & Brother.) 6 Cow. 181, 18 Johns. R. 24; 3 Johns. Ch. R. 569; 5 Serg. & Rawle, 27; 2 East., 523.

By drawing against the consignments and getting the bills discounted for their own use they appropriated so much of the proceeds, and became responsible for them. 5 Leigh, 456.

II. Pomeroy & Andrews did not entitle themselves to recover of Sigerson their advances upon the lard destined for Liverpool by showing the insolvency of their consignees in New Orleans (without reference to the arrangement between them and Andrews & Brother.)

III. Pomeroy & Andrews should not have recovered their advances on the lard destined for Liverpool, when their consignees in New Orleans sold it there, contrary to the instructions given by Sigerson to Pomeroy & Andrews.

IV. Pomeroy & Andrews having been repaid their advances (or having raised the money to make them) by negotiating bills drawn by them against the shipments, cannot recover the advances made, without showing that they have paid those bills, or are liable to pay them.

V. Pomeroy & Andrews were partners of Andrews & Brother, as to Sigerson, in the shipment and sale of his goods and consequently they cannot recover of Sigerson, their advances by showing the insolvency of Andrews & Brother. *Waugh vs. Carver*, 2d H. Bla., 230, leading case; *Cheap vs. Cramonds*, 4 B. and A., 663; (6 Eng. Com. Law R., 556;) *Ex-parte Chuck & Bingham*, 469; (21 Eng. Com. Law Rep., 346;) *Ex-parte Didby, &c.*; 1 Deacon, 341; (38 Eng. Com. Law Rep. 495;) 4 B. and C., 867; (10 Eng. Com. Law Rep., 460;) *Welden vs. Shubourne*, 15 Johns. Rep., 409; *Rob vs. Halsey*, 16 Johns. R., 34; *Musier vs. Trumbour*, 5 Wend., 274; *Sims vs. Welington*, 8 Serg. and Rawle, 103; *Champion vs. Bostwick*, 18 Wendall, 175; *Everet vs. Chapman*, 6 Conn. Rep., 347; *Brown vs. Robbins* 3 N. H. 64; 3 Har. and J., 505; 9 Metcalf, 380; 16 Pick., 412.

VI. If Pomeroy & Andrews and Andrews & Brother were not partners, under the arrangement between them, their case is taken out of the general rule, that, all who share the profits of a business or adventure are partners in it, upon the ground that one house was the agent of the other; and if Pomeroy & Andrews were the agents of Andrews & Brother, then they were not entitled to recover at all, especially for the default of their principals, or if Andrews & Brother were the agents of Pomeroy & Andrews, then they could not recover for the insolvency of their own agents.

VII. A new trial should have been granted because the verdict was clearly against the evidence. As to the power of the supreme court to order a new trial where the circuit court refuses to grant one, on the sole ground of the verdict being against evidence, see *Hart vs. Leavenworth*, 11 Mo. Rep., 629. The verdict was against the evidence in the following particulars.

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1st. There was no testimony given tending to prove that the insolvency of Andrews & Brothers (if that was proved) occasioned any loss to Pomeroy & Andrews of Sigerson's goods or their proceeds.

2nd. There was no evidence that the bills drawn by Pomeroy & Andrews on Andrews & Brother against Sigerson's property were not fully paid by Andrews & Brother.

3rd. There was sufficient evidence that Pomeroy & Andrews, themselves disobeyed Sigerson's instructions in reference to the lard ordered to be shipped to Liverpool, for (even if they did not waive the condition or proviso in Sigerson's order by receiving and shipping the lard) they added another condition or proviso in their direction to their consignees in New Orleans, namely that if the consignees could ship it, so as to make their (P. & A.'s) advances good with all charges for receiving and forwarding, they had better send it through as Sigerson was very anxious to have it sent to Liverpool; and the importance of this condition was shown by the fact that the consignees of the lard, not being able to get an advance sufficient to cover P. & A.'s advance and charges, sold it in New Orleans. 3 Wash. C. C., 151; 2 Blackf., 130; 6 Cow., 128; 7 Cow., 456; 11 Mo. R., 88, Switzer vs. Connett.

6th. The verdict included in its amount the balance due from Sigerson to Andrews & Brother on account of the contract for the sale of pork by Sigerson to Andrews & Brother, in which balance Pomeroy & Andrews had no interest.

R. M. FIELD, for appellees.

1. There was no error in the instructions given by the court. 1st. The first instruction correctly explains the duties and responsibilities of commission and forwarding merchants. Story's agency, § 33, 183, 186.

2nd. The second instruction is a corollary from the first. Story's agency, § 342; Burrill vs. Phillips, 1 Gall. Rep., 360.

3rd. The third instruction was proper, for it is manifest that the witnesses for the defendant below, under color of proving a usage of St. Louis, gave only their opinions of the general laws, or what is the same thing, a usage throughout the whole commercial world.

4th. The fourth instruction was correctly given. By a series of decisions commencing with Dixon vs. Cooper, (3 Wels. 40) it is firmly settled that a compensation to an agent out of the profits of a business does not make the agent a partner. See cases collected in 1 Smith's leading cases 491 et. seq.

In the present case there was no agreement to share profits, but only to pay the plaintiff a commission on the gross amount of sales.

The more recent cases have established as a test of partnership the right to call for an account and to a specific lien on the proceeds of the business to the exclusion of general creditors.

3 Kents Com. 25 (4th Edition); Champion vs. Bostwick, 18 Wend., 175; Denny vs. Cabot, 6 Metcalf, 82; Buckler vs. Eckhart, 1 Den., 337; Bradley vs. White, 10 Metcalf, 303; Miller vs. Bartlett, 15 S. and R., 137; Heckhart vs. Fegerly, 6 Wats. and S., 143; Loomis vs. Manhall, 12 Conn., 69; Hodges vs. Dawes, 6 Alab. Rep., 733.

II. The defendants' instructions were properly refused.

1st. The first was the opposite of the fourth given, and was consequently improper if the last was correct.

2, 3 and 4th. The three last were manifestly improper as seeking to draw into the case the relation of the plaintiffs to their creditors, with which the defendant and the jury had no concern. So far as the plaintiffs had received any thing on the bills out of the proceeds of the defendants' produce, the defendant would have had the benefit of it under the 6th instruction given by the court on defendant's motion. Beyond this the existence of the bills was of no importance in the case. The plaintiffs had a right to recover their advances immediately in the absence of any proof of an extension of credit. Beckwith vs. Sibley, 11 Peck., 462.

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RYLAND, Judge, delivered the opinion of the court.

From the above statement, the points necessary for our adjudication arise from the instructions given, as well as those refused by the court below.

The general principles involved in this case will not be disputed. The factor must strictly follow the orders and instructions of his principal, and a departure from them will be at his own risk.

If the factor shall with proper care and diligence, faithfully and *bona fide* carry out the orders of his principal, and notwithstanding he does this, a loss shall still accrue, this loss must fall on the principal. The factor's making advances upon the shipments made, does not withdraw him from the necessity to obey the directions accompanying the commodity which he received for shipment.

In the case now before us, the plaintiffs below contend that they obeyed the instructions of the defendant Sigerson, in regard to the shipping of the lard; by sending the letter of Sigerson which had been addressed to them, to Andrews & Brother, commission merchants of fair standing at the time in New Orleans, to whom they had consigned the lard.

While on the other hand, Sigerson contends, that Pomeroy & Andrews did not obey his directions, that although they forwarded his letter to their consignees, yet it was accompanied with other directions, orders, conditions and requirement, which caused a violation of the directions given by him to Pomeroy & Andrews.

Whether Pomeroy & Andrews did obey these directions, by giving the same to their consignees in New Orleans; or whether they departed from them or altered them, by adding conditions and requirements inconsistent therewith, was a fact to be left to the finding of the jury, and the first instruction which the court gave on the part of the defendant, embraced this subject. We do not feel ourselves at liberty to disturb this finding, however we might differ from the jury in reaching the conclusion they did in this case.

We find no fault with the first instruction given by the court for the plaintiffs below; and shall therefore pass it by.

We do not assent to the second instruction for the plaintiffs in this case.

It has a tendency to withdraw from the jury the enquiry as to the connection between Pomeroy & Andrews and Andrews & Brother, whether there was a partnership or not in the profits and losses arising from the shipping and forwarding produce generally. It also took from them the

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enquiry, whether the plaintiffs in this action were the agents or not as they stood between Andrews & Brother and Sigerson, in this business; and whether the lard was lost by a violation of Sigerson's orders, caused by the plaintiffs or not. We think this instruction as it stands, might mislead the jury, and was therefore improper.

The refusal of the court to give the 3d instruction asked for by the defendant, as marked in the above statement, is in our opinion erroneous. This instruction contains a correct legal proposition, and was applicable to the facts in proof and ought to have been given to the jury.

If Pomeroy & Andrews only advanced money got from the sale of bills, drawn by them on Andrews & Brother on the shipment of Sigerson's property to Andrews & Brother, and Andrews & Brother received the shipments and thus were in receipt or possession of the fund drawn on, then Pomeroy & Andrews could have no claim on Sigerson without shewing, that the bills or some of them have been dishonored, and that they paid or become liable to pay the same.

In our opinion then without taking notice any further of the instructions, the judgment of the court below is erroneous. The motion for a new trial should have been sustained.

The judgment is therefore reversed and cause remanded. Judge Birch concurring herein.

